IN THE SUPREME COURT

OF

THE UNITED STATES

October Term, 1923

No. 330

DAYTON-GOOSE CREEK RAILWAY COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA ET AL, *Appellees*.

Appeal from the District Court of the United States for the Eastern District of Texas

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BRIEF FOR APPELLANT

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Statement of the Case.

This suit was instituted in the District Court of the United States for the Eastern District of Texas, at Beaumont, by a petition or bill of complaint filed December 6, 1922, by appellant, Dayton-Goose Creek Railway Company, as petitioner, against The United States of America, herein called the United States, the Interstate Commerce Commission, herein called the Commis-

sion, and Randolph Bryant, the United States District Attorney for the Eastern District of Texas (R. 2). The prayer of the petition was that the court (under Judicial Code, Sec. 207, 208, U. S. Comp. Stat. 1916, Sec. 993, 997, and the Act of October 22, 1913, U. S. Comp. Stat. Sec. 992, 998) vacate, annul and set aside two certain orders of the Interstate Commerce Commission relating to the so-called "*recapture of excess earnings*" of carriers by railroad under Section 15-a of the Interstate Commerce Act (Transportation Act 1920, Section 422); and that under the Commerce Court as well as under the general equity powers of said court, it enjoin and restrain the enforcement against appellant of the recapture and reserve fund provisions of said Section 15-a, and said orders of the Commission.

The Commission filed an answer on January 8, 1923 (R. 35), and on February 16, 1923, the United States and the Defendant Bryant filed an amended motion to dismiss the petition or bill of complaint. (R. 40.)

On these pleadings, and on the testimony below mentioned, Complainant's application for an interlocutory injunction was heard, with said motion to dismiss at New Orleans, Louisiana, on February 16, 1923, before Circuit Judges R. W. Walker and Alex C. King, and District Judge Rufus E. Foster, sitting as judges of the District Court under the Urgent Deficiencies Act (38 Statutes 219).

By an order dated March 15, 1923, filed on the following day (R. 70), Complainant's application for an interlocutory injunction was denied, and the amended motion of the United States and the defendant Bryant to dismiss the petition was granted, for the reasons and

upon the grounds indicated in the opinion of the court below (R. 64-70), which will be found reported in 287 Federal Reporter, 728.

An appeal direct to this court was prayed and allowed on April 6, 1923 (R. 71), assignments of error (R. 72) and a proper appeal bond (R. 78) were filed and a citation duly issued and service thereof waived (R. 77). A statement of the evidence was agreed to, approved and filed (R. 42), and the record was duly made up and filed in this court for review.

The orders of the Commission sought to be set aside were those entered by the Commission, on its own motion, relating to the so-called recapture of excess earnings or income under Section 15-a of the Interstate Commerce Act. They were dated, respectively, January 16, 1922 (R. 19-22) and March 16, 1922 (R. 22-24), and appear in full in the record. The order of January 16th related to the accounting period ended December 31, 1920, and commencing March 1, 1920, or September 1, 1920, depending, under paragraph (1) of the order, upon whether the reporting carrier accepted the six months guaranty afforded by Section 209 of the Transportation Act, 1920. It was, therefore, referred to in the petition as the 1920 order. The order of March 16th related to the calendar year 1921, and was, therefore, called the 1921 order. The 1920 period commenced, as to appellant, on March 1, 1920, as it did not accept the guaranty.

Paragraphs (2), (3) and (4) of the 1920 order, containing certain regulations, incorporated by reference into the 1921 order, are as follows:

"(2). That the excess income for the portions of a year ended December 31, 1920, shall be prelim-

inarily fixed as the income in excess of such proportions of 6 per cent of the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

"(3). The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled 'in the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates,' Docket No.....Ex Parte 74, with adjustments for—

"(a) New lines, extensions and additions, and betterments;

"(b) Retirements;

"(c) Amounts of property for which permission to retain earnings under paragraph (18) of Section 15a of the Interstate Commerce Act has been granted; and

"(d) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such railway property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of Section 15a of the Interstate Commerce Act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected. In

the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31, 1919, with proper adjustments as hereinabove indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of Section 15a of the Interstate Commerce Act.

"(4) The establishment of preliminary bases for prorating the return of 6 per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported."

Pursuant to these rules each carrier subject to the Act, except sleeping car companies, street railways and the like, was directed by the two orders in question to report to the Commission, for the respective periods involved, the amount by which its net railway operating income, for the period covered by the order, exceeded or fell below that percentage of the value of its railway property fixed by said rules, with the details of the calculation, and a detailed statement of the valuation used. The orders also required, in cases where so-called excess income was reported, that the carrier state (a) the title of the fund account in which one-half of such excess was placed (b) as to the fund, the date when established, the amount therein, and how the assets therein are represented or held; and (c) the amount of the other half of such excess paid to the Commission and when and how paid. Each order also provided that if the half of the so-called excess income payable under such order to the Commission was unpaid it "should be paid by re-

mittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C." (R. 21, 24.)

Appellant, under protest, duly filed its returns, as required by these orders of the Commission, showing therein so-called excess earnings, calculated *upon a valuation based solely on investment in road and equipment*, amounting to $21,666.24 for the period March 1 to December 31, 1920 (R. 24-27); and for the calendar year 1921, amounting to $33,766.99 (R. 28-33).

Under date of October 20, 1922, the Director of the Commission's Bureau of Finance wrote appellant, stating that appellant's returns showed "excess income as preliminarily computed," amounting to $55,433.23, and demanding that appellant "fully comply with the orders" of the Commission by:

> "(a) Advising the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held;
>
> "(b) Remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed." (R. 34.)

The bill, in addition to describing the aforementioned orders and demand, alleged that the complainant was a carrier by railroad subject to the Interstate Commerce Act, with its principal office in the Eastern District of Texas, owning and operating a line of railroad wholly within said State; that the orders above referred to were entered by the Commission on its own motion and without complaint for the purpose and with the design of

enforcing those provisions of Section 15a of the Interstate Commerce Act relating to the recovery by and payment to the Commission of so-called excess railway operating income and the establishment and maintenance of the reserve fund mentioned in said Section 15a. It also alleged the filing of said returns and attached copies thereof to the petition as exhibits.

The bill further alleged that as to appellant the said orders of the Commission, and Section 15a of the Interstate Commerce Act upon which they were based, are null and void, because in contravention of the Constitution of the United States in the following respects:

(1) The recapture and reserve fund provisions of the Act, and the orders of the Commission based thereon, are in contravention of the Fifth Amendment to the Constitution of the United States, in this:

(a) The requirement that appellant pay to the Commission and into said reserve fund a portion of the income and revenues derived from, and being therefore, a part of, its private property, by it owned and devoted to carrier uses prior to and since the passage and approval of said Act, will, if enforced, take appellant's property without due process of law and without just compensation.

(b) Such requirement, if enforced, will deprive appellant of the liberty of using and disposing of its private property according to its own judgment and of the liberty of retaining and possessing its private property, without due process of law.

(c) Such requirement, if enforced, will deprive appellant of its property without due process of law by subjecting it to arbitrary, unequal and discriminatory

legislation by virtue of the fact that such requirement is not applied to other persons or corporations and not even to other railroad carriers similarly situated and in the same territory.

(d) The rates, fares and charges under which appellant's earnings accrued in each of the accounting periods covered by the orders of the Commission having been no more than reasonable, and the carriers operating in the rate group in which the Commission, in its order in Ex Parte 74, placed appellant, having failed to earn in either of said periods the fair return contemplated by Section 15a, to compel appellant to pay to the Commission and into said reserve fund any part of the revenues accruing to it by virtue of its favorable location, density of traffic or other special causes, is to deprive it of its property without due process of law and without compensation.

(e) While the general level of the rates charged and collected by appellant during the respective periods here involved must, as between the parties hereto, be presumed to be reasonable and non-excessive, nevertheless, specific rates are open to attack, within the periods of limitation, by shippers and consignees who may hereafter recover as reparation a part of the earnings shown on appellant's returns to the orders of the Commission. Likewise, recoveries later may, and probably will, be had against appellant on causes of action actually arising during the periods here involved, such as claims for loss of and damage to freight and injury to and death of persons, in connection with the conduct of railroad operations. By making no provision for refund or adjustment in case appellant have no

so-called excess earnings in the subsequent period or periods when any such recovery is paid by appellant, from which such payment may be deducted, the Act and the orders of the Commission subject appellant to a double recovery, upon the unwarranted presumption that appellant will always have so-called excess earnings sufficient to cover the payment of any such amounts, and therefore their enforcement will deprive it of its property without due process of law (R. 6-13).

(2) A large proportion of appellant's income, reflected in each of its said returns to the Commission, accrued solely as charges for the transportation of passengers and freight in intrastate commerce conducted wholly within the State of Texas; that neither interstate or foreign commerce nor the persons engaged therein could be in any manner injuriously affected by large earnings accruing to appellant from intrastate commerce, and that it is not within the province of Congress or the Commission to take from appellant any part of the earnings accruing to it from purely intrastate commerce, control over which has been expressly reserved to the State of Texas and its people by the Tenth amendment to the Constitution of the United States. The effect of the Act referred to and of the Commission's orders, if enforced against appellant, will be to require appellant to pay over to the Commission and to place in the reserve fund contemplated by the Act a portion of its earnings from purely intrastate commerce, and to limit and restrict the right of appellant, a Texas corporation, to earn money in the course of a business conducted wholly within that State, in violation of said tenth amendment (R. 13-14).

(3) The bill also contained an averment that while

the returns made by the appellant in pursuance of said orders truly reflected the property *costs* and *book* values, according to the rules and requirements of the Commission as understood by appellant, those figures did not represent the *true value* of appellant's property, devoted to and used for common carrier purposes; and that the same had been used in said returns because it understood the rules of the Commission required the use of the figures shown on its books of account, and it was proven that the *true value* of the property largely exceeded the figures used in the returns.

It was likewise pleaded that the returns did not show the *actual* receipts, expenses and income, properly and equitably attributable to the periods involved, as more fully set forth in the complaint respecting a lack of provision for adjustments to cover the delayed determination of causes of action arising in such periods (R. 5-6).

On the hearing, in support of the allegation that the true value of the property was not shown in the returns, appellant introduced in evidence (a) a valuation of appellant's property as of June 30, 1922, by the Railroad Commission of Texas, acting in the scope of its proper powers, in the sum of $929,020.82 (R. 42-43); (b) the affidavit of A. E. Kerr, appellant's vice-president and general manager, stating that in his opinion the value of the property of appellant, held for and used in the service of transportation during the year 1920, was not less than $796,668.80 and during 1921 not less than $877,594.52 (R. 44-45); and (c) the affidavit of J. J. Balderach, appellant's vice-president and treasurer, stating that in his opinion the true value of appellant's said property was substantially in excess of any valua-

tion figure used in either of said returns or reports (R. 49). Balderach's affidavit also showed some pending, unadjusted claims arising in both periods.

The further question is therefore presented whether the court below erred in refusing the application for injunction and dismissing the bill in the light of these facts, pleaded, proven and plainly admitted by the motion to dismiss.

The court below held that Section 15-a levied an excise tax and was therefore not subject to attack as a deprivation of property without due process or just compensation. This construction of the statute is assailed in the assignment of errors (R. 72).

The questions involved on this appeal, therefore, are:

(1) Do the orders of the Commission, and the Act upon which they are based, deprive appellant of its property without due process of law and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States?

(2) Do said orders and said act so directly affect and control the internal affairs and commerce of the State as to contravene the tenth amendment to the Constitution of the United States?

(3) Does Section 15a of the Interstate Commerce Act, properly construed, levy an excise tax?

(4) Did the court below err in dismissing the bill, in view of the facts: (a) that the amount of the so-called excess earnings, claimed in the Commission's demand and shown on the face of the returns, necessarily depends upon the value of the property, and (b) that

upon this record it must be conclusively presumed that the *true* value of the property is far in excess of the amounts used in the returns?

These questions logically divide themselves, for discussion, into many subheads and propositions and will be so divided for the argument which follows in this brief.

Specification of Errors.

For a reversal of this case we rely upon the assertion that the court below erred in the following and each of the following respects, which are set forth in the assignment of errors filed in the court below, to-wit:

"1. In denying and refusing appellant's application for an interlocutory injunction as prayed for in its petition herein.

"2. In granting the motion of the defendant, The United States of America, to dismiss appellant's petition, and in dismissing the same.

"3. In holding and deciding that, as to appellant, the Act of Congress referred to in its petition herein, and the orders of the Interstate Commerce Commission entered in pursuance thereof and likewise referred to, are valid, constitutional and enforceable to the extent of that portion of appellant's earnings thereby required to be paid to the Interstate Commerce Commission, as levying and assessing a tax.

"4. In holding and deciding that the part of the income of appellant required by said act and by said orders to be paid to the Interstate Commerce Commerce Commission was not collected by appellant absolutely as its property but that the same was earned and collected under the terms of the Transportation Act, 1920, in trust for the United States.

"5. In holding and deciding that appellant dur-

ing either of the periods involved in this suit had any excessive income or earnings.

"6. In holding and deciding that appellant does not contend that the part of its net revenue from its railway operations, which, under the provisions in question, it is permitted to retain, is less than a fair and remunerative return on its investment in road and equipment.

"7. In failing to give full and due consideration to the undisputed evidence to the effect that the value of appellant's property held for and used in the service of transportation and therefore a fair return upon such value was and is far in excess of the amounts shown on the reports made by appellant to the Interstate Commerce Commission for the respective periods involved.

"8. In assuming, holding and deciding that in the several years during which appellant may be obliged to pay liabilities which accrued during one or both of the periods involved in this suit, appellant will have so-called excess earnings equal to or in excess of the amount of such payments and that appellant will thereby secure the same full benefit of deducting such payment or payments as would be afforded by a provision for a refund by the Interstate Commerce Commission to appellant, based upon actual payments of liabilities accrued in previous accounting periods during which so-called excess earnings existed.

"9. In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination.

"10. In holding and deciding that it may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged.

"11. In holding and deciding that it hardly lies in the mouth of appellant to suggest that the rates

charged by it will be considered unreasonable where fixed by it within a maximum allowed by the Interstate Commerce Commission.

"12. In holding and deciding that appellant could not be made liable by a shipper as for an overcharge for any moneys paid therefrom to the United States under the terms of the Interstate Commerce Act.

"13. In holding and deciding that appellant has no right to restrain the government from collecting from it so-called excess earnings which accrued to it from the collection of excessive charges; for that the Interstate Commerce Act expressly imposes liability upon appellant for all such amounts so collected by it, and the shipper damaged thereby has two years in which to file his claim against appellant; and if appellant may be compelled to pay to the government any sum accruing from such collections and then later be required to respond to the claim of the shipper when the Interstate Commerce Commission has determined the fact and amount of damage, the result would be the payment of a part of such excess to the government and a subsequent payment to the shipper, out of appellant's own funds, of the full amount of the excess, resulting in a double recovery against appellant, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

"14. In holding and deciding that appellant may be compelled to pay to the Interstate Commerce Commission a portion of the money accruing to it from the exaction of an unreasonable rate and then subsequently be compelled to pay to the shipper as reparation the amount to the extent of which the rate may be determined to have been unreasonable, being a part of the so-called excess earnings already paid to the said Commission.

"15. In holding and deciding that as to appellant the requirements of Section 15*a* of the Interstate Commerce Act, and said orders of the Interstate

Commerce Commission entered in pursuance thereof, and each of them, with respect to the payment of money to the Interstate Commerce Commission by appellant, are not, as to appellant, null and void, because taking appellant's private property without due process of law and without compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

"16. In holding and deciding that, as to appellant, Section 15*a* of said act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to appellant null and void, because taking appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States.

"17. In failing and refusing to hold and decide that the property of appellant and the entire income, revenues, earnings and profits arising therefrom are the private property of appellant and that said act and said orders, insofar as they attempt to require the payment of money by appellant to the Interstate Commerce Commission, and into said reserve fund, are in violation of the Fifth Amendment to the Constitution of the United States and therefore void as taking appellant's private property without just compensation and without due process of law.

"18. In failing and refusing to hold and decide that the provisions of said act and said orders requiring a portion of appellant's so-called excess earnings to be placed in a reserve fund to be drawn upon for specific and limited purposes only, deny to appellant, without due process of law, and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States, the liberty of ownership, control, use and disposition of its property.

"19. In failing and refusing to hold and decide

that said act and said orders, and each of them, are void insofar as they undertake to regulate, limit or restrict the use or expenditure of so-called excess earnings by appellant and to require appellant to pay any portion thereof to the Interstate Commerce Commission, for any purpose, for that the enforcement thereof against appellant would deny to it the equal protection of the law, subject it to unequal, arbitrary and discriminatory laws and thereby take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

"In failing and refusing to hold and decide that because appellant owned and operated its properties long prior to the passage and approval of the Act containing said Section 15*a*, appellant, under the Constitution of the United States, owned and possessed and has continuously since owned and possessed the right to collect and receive, and to retain and exercise, complete, untrammeled and unrestricted dominion and control over all revenues, earnings, receipts and income produced by said properties, and that all savings and earnings resulting therefrom became instantly upon the accrual thereof and continued thereafter to be the private property of appellant; and, insofar as said section and said orders undertake to compel appellant to pay to said Commission for public use, or otherwise, or to retain and use only in certain contingencies, and then only for certain limited purposes, any part of such revenues, earnings, receipts and income, said Act and orders are null and void, for that if enforced against appellant they would deprive appellant of its liberty and of its private property without compensation and without due process of law, and deny to appellant the equal protection of the law, in violation of the Fifth Amendment to the Constitution of the United States and of the fixed and vested rights, privileges and immunities which appellant held and possessed under the Constitution of the

United States at the time of the passage and approval of said act.

"21. In holding and deciding that the United States could for any purpose have any interest in or title to any amount or sum of money accruing to appellant for transportation services not performed for the United States.

"22. In failing and refusing to hold and decide that all earnings and income accruing to appellant from traffic moved on just and reasonable rates is the private property of appellant and can not be taken without due process of law nor without just compensation consistently with the Fifth Amendment to the Constitution of the United States.

"23. In failing and refusing to hold and decide that said Act and orders are void as taking appellant's private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States, in requiring payment of so-called excess earnings to the Interstate Commerce Commission and into said reserve fund without making reasonable provision for the final determination of the actual net earnings for the year or period involved and for proper refund or adjustment based thereon.

"24. In failing and refusing to hold and decide that said Section 15*a* is contradictory in its terms and incapable of enforcement, and that therefore said section, and the orders of the Interstate Commerce Commission predicated thereon, are null and void as to appellant, because the enforcement thereof would take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

"25. In holding and deciding that as to appellant the provisions of said section 15*a* and said orders of the Interstate Commerce Commission requiring the payment of money by appellant to said Commission and into a reserve fund are valid and enforceable and are not, as to appellant, null and

void as an unwarranted regulation of and burden upon, commerce conducted wholly within the State of Texas and the earnings and revenues therefrom, imposed by the Congress of the United States and the Interstate Commerce Commission in contravention of the Tenth Amendment to the Constitution of the United States.

"26. In failing and refusing to hold and decide that as to appellant said section and said orders in effect impose a direct and unwarranted limitation upon the right of a corporation created under the laws of the State of Texas to earn money from the conduct of commerce carried on wholly within the State of Texas, and in no wise related to interstate or foreign commerce, and not subject to the control of Congress or of the Interstate Commerce Commission, and that said act and orders are therefore void because in contravention of the Tenth Amendment to the Constitution of the United States.

"27. In holding and deciding that the Congress and the Interstate Commerce Commission are not prohibited by the Tenth Amendment to the Constitution of the United States from requiring appellant to pay to the Interstate Commerce Commission any part of any fund earned by appellant in purely intrastate commerce within the State of Texas." (R. 72-76.)

Brief of the Argument.

Inasmuch as the force and validity of the Commission's orders sought to be set aside in this case necessarily depend upon the construction and validity of the law upon which they were based, and for the enforcement of which they were intended, we copy here in full, for the convenience of the court and counsel, the material portions of Section 15a of the Interstate Commerce Act (41 Stat. 488):

"Sec. 15a. (1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any beltline railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate group or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such

aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this act in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair rereturn, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

"(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

"(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum

equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

"(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

"(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in the authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary relating to government deposits. * * * "

"(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any

particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

"(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission."

Paragraphs (11) to (16), inclusive, are omitted because they deal only with the administration by the Commission of the general railroad contingent fund referred to in the other paragraphs of the Section.

Under what constitutional power of Congress were the foregoing provisions enacted? The District Court held that these provisions were the result of an exertion of the taxing power (R. 67, 287 Fed. 728). That this conclusion is erroneous will, we think, be demonstrated. Congress, by including these provisions in the Interstate Commerce Act, expressed the view that this section was a regulation of commerce between the States. "As a whole, these acts show that what is intended is to regulate interstate and foreign commerce." (*State of Texas v. Eastern Texas R. R. Company,* 258 U. S. 204, 42 Sup. Ct. Rep., 281).

The act can properly be sustained if at all, only under

the power of Congress to regulate commerce, and if the act under consideration is not a valid regulation of commerce, it must fall for a total want of Congressional power.

The four principal questions involved in the case are:

(a) DOES THE SO-CALLED RECAPTURE CLAUSE OF THE TRANSPORTATION ACT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

(b) DOES IT VIOLATE THE TENTH AMENDMENT?

(c) DOES IT ASSESS OR LEVY A TAX?

And if these questions be answered favorably to the government,

(d) DOES THE RECORD IN THIS CAUSE SHOW A VALUATION UPON WHICH THE QUANTUM OF THE SO-CALLED EXCESS EARNINGS MAY BE RECAPTURED?

In other words, does the measure of the value of appellant's property on the basis applied by the Interstate Commerce Commission square with the doctrine of the Missouri telephone case recently decided by this court?

At the threshold of the first question we are confronted with two propositions, the answers to which will tend very greatly to simpify the determination of the issues here involved.

The first preliminary question is: How far is the power of Congress to regulate interstate commerce supreme? How far is that power subject to other consti-

tutional limitations? And how far, if at all, may Congress exercise that power in conflict with or in violation of the Fifth Amendment of the Constitution of the United States?

The second preliminary question involved, which may be said to grow out of the first, is: how far Congress may exercise its power of regulation upon private property devoted to a public use, and how far the public use of such private property modifies, impairs or destroys the private character of the property and relieves it, if at all, from the sanctity and protection of the Fifth Amendment.

I.

The power of Congress to regulate Interstate Commerce is subject to constitutional limitations and particularly to the limitations of the Fifth Amendment to the Constitution of the United States.

This principle has been so frequently enunciated by this court that a very brief reference to the decisions will suffice to sustain it:

In *Gibbons v. Ogden,* 9 Wheat. 1, 68 Ed. 23, Chief Justice Marshall, referring to the power of Congress over interstate and foreign commerce, said:

> "This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."

In *Champion v. Ames,* 188 U. S., 321, 47 L. Ed. 492, 501, the court said:

> "It must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no

limitations except such as may be found in the constitution."

In *United States v. Joint Traffic Association*, 171 U. S., 505, 43 L. Ed. 259, 288, the court said:

> "The power to regulate commerce has no limitations other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution or in any of the amendments to that instrument."

In *Interstate Commerce Commission v. Brinson*, 154 U. S., 447, 38 L. Ed. 1047, 1058, this statement occurs:

> "It was said in argument that the Twelfth Section (of the Interstate Commerce Act) was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees."

Monongahela Nav. Co. v. United States, 148 U. S., 312, 37 L. Ed. 463, announces the same principles:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of Commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to limitations imposed by this Fifth Amendment and can take only on pay-

ment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and postroads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."

In *Adair v. United States*, 208 U. S., 161, 52 L. Ed. 436, 445, the court referring to the power of Congress over interstate commerce, said that this power "can not be exerted in violation of any fundamental right secured by other provisions of the Constitution."

In *Wilson v. New*, 243 U. S., 332, 61 L. Ed., 755, 776, the court said:

"The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public from the injury resulting from a failure to exercise the private right. In saying this, of course, it is always to be borne in mind, that as to both carrier and employe, *the beneficient and ever present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power*, which, if given effect to, would amount to a denial of due process or would be repugnant to any other constitutional right." (Italics ours.)

In the *Railroad Commission Cases*, 116 U. S., 307, 29 L. Ed., 636, the rule was thus stated:

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. *This power to regulate is not the equivalent of confiscation.* Under pretense of regulating fares and freights the State cannot require a railroad corporation to carry persons or

property without reward; neither can it do that which in law amounts to a taking of private property without just compensation or without due process of law." (Italics ours.)

Speaking through Mr. Justice Harlan, in *Scranton v. Wheeler*, 179 U. S., 141, 45 L. Ed., 126, 133, the court said:

"Of course, in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use."

Referring to the power of Congress to improve the internal waterways in aiding navigation, the court, in *United States v. Cress*, 243 U. S., 316, 326; 61 L. Ed., 746, 752, citing some of the other cases herein referred to, said:

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."

In *United States v. Lynah*, 188 U. S., 445, 465, 471; 47 L. Ed., 539, 546, 549, Mr. Justice Brewer, speaking for the court, said:

"All private property is held subject to the necessities of the government. The right of eminent domain underlies all such rights of property. The government may take real or personal property whenever its necessities or the exigencies of the occasion demand. So, the contention that the government had a paramount right to appropriate this

> property may be conceded, but the Constitution, in the Fifth Amendment, guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Again, he said:

> "If any one proposition can be considered as settled by the decisions of this court, it is that, although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

In other words, it has been so thoroughly established as to be now indubitable that the power of Congress to regulate commerce can be exercised without any limits whatsoever, except those prescribed by the Constitution itself; but that those other limitations, placed upon Congress by the Constitution, are just as binding upon the courts and are just as powerful for the protection of the citizen as the power to regulate commerce by Congress.

Therefore, if the only source of congressional power available to support the law in question is the authority to regulate commerce, the enactment cannot be sustained, if, in violation of the Fifth Amendment, it deprives appellant of its property without due process of law, or without just compensation; or if, in violation of the Tenth Amendment, it necessarily regulates the internal affairs of the State, not as merely incidental to a real regulation of interstate commerce, but directly, and without any real and substantial relation to the proper scope of a regulation of interstate commerce. *Hammer v. Dagenhart*, 247 United States, 251, 62 L. Ed. 1101.

These authorities conclusively establish the proposition, considered in connection with those opinions of this court discussing the constitutional power to regulate commerce and declaring that power to be supreme, that this court has always nevertheless held that the exercise of that power was, and is, and shall forever be, subject to the limitations in the Fifth Amendment, and that the protection of private property is just as complete under the Fifth Amendment and just as sacred against the right to regulate commerce, and just as full protection to the citizen against that power as it is against any other power sought to be exercised by Congress.

II.

The property of appellant held for and used in the service of transportation during the periods here involved, while devoted to a public use, has remained nevertheless at all times appellant's private property, protected as such by the Fifth Amendment. The income produced by that property, and the revenues accruing from its use, are likewise private property, and is likewise protected. A seizure, direct or indirect, of any part of such income or revenues necessarily reduces the productiveness or earning power of the property and, by that much, constitutes a taking of appellant's property because the value of the property depends directly upon its capacity to produce a return.

It was alleged in the bill of complaint that appellant was then, and had been since a date long prior to the 29th day of February, 1920, a common carrier by railroad, owning and operating a line of standard gauge railroad situated in the State of Texas, and that the

earnings and revenues from that railroad property were sought to be affected and taken by the act and orders here involved. (R. 2, 3, 5-7.) That the railroad property, so owned and operated by appellant prior to and since the enactment of the law herein assailed, is the private property of appellant, can not be doubted. This court has so repeatedly held this to be true that the doctrine may not at this date successfully be challenged. A brief reference to important decisions on the question is made.

In *Interstate Commerce Commission v. Chicago Great Western Railroad,* 209 United States, 108, 52 L. Ed., 705, Mr. Justice Brewer said:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."

In a more recent case, *Vandalia Railroad Co. v. Schnull,* 255 United States, 113, 65 L. Ed., 539, the rule is thus stated:

> "A railroad is private property, and as such, a rate may be fixed for its use; but it is private property devoted to the public service, and as such it is subject to the power of the State to see and require that the rate fixed be just and reasonable—one that, while it will yield a revenue to the railroad, will be proportioned to that which should be charged to the public. And this relation of right and power is illustrated in many cases."

In *Missouri Pacific R. R. Co. v. Nebraska,* 164 U. S. 403, 41 L. Ed. 489, it is declared, at page 415:

> "A railroad corporation doubtless holds its station grounds, tracks, and right-of-way as its private property, but for the public use for which it was incorporated, and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers * * * * * , but how far the railroad company can be compelled to do so, against its will, is a wholly different question."

The issue made in that case was whether or not the land of the railroad company devoted to a public use, might be taken against its will, and devoted to some other use which, in the opinion of the Nebraska Board of Transportation, was necessary or desirable for the use of an elevator to be erected upon the premises. And in concluding the opinion of the court Mr. Justice Gray (page 417) declared:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment to the Constitution of the United States. Wilkinson v. Leland, 27 U. S. 2 Pet. 627, 658, (7:42, 553); Den, Murray, v.

Hoboken Land & I. Co., 59 U. S. 18 How. 272, 276 (15:372, 374); Citizens Sav. & L. Assn. v. Topeka, 87 U. S. 20 Wall. 655 (22: 455); Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 618); Cole v. LaGrange, 113 U. S. 1 (28: 896); Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 158, 161, ante, 59); State v. Chicago, M. & St. P. R. Co. 36 Minn. 402."

In the case of *Missouri Pacific R. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727, the court speaking through Mr. Justice Holmes said:

"It is also true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—power commonly called the police power. But railroads, after all, are properly protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

In *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735, Mr. Justice Hughes delivered the opinion of the court, and at page 595 said:

"The railroad property is private property devoted to a public use. • • •

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed."

And at page 604, in concluding the opinion, the following language was used:

> "But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and *thus the carrier would be denied a reasonable reward for its service* after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority." (Ialics ours.)

In *Norfolk & Western v. Conley,* 236 U. S. 605, 59 L. Ed. 745, Mr. Justice Hughes, delivering the opinion, at page 608 said:

> "The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in Northern P. R. Co. v. North Dakota, decided this day (236 U. S. 585, ante, 735, 35 Sup. Ct. Rep. 429), makes an extended discussion of this question unnecessary. It was recognized that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification or the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devo-

tion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal."

In *Great Northern Railway Company v. Minnesota,* 238 U. S., at page 340, 59 L. Ed. 1337, Mr. Justice McReynolds, speaking for the court, said:

> "A railroad's possessions are subject to its public duty; but beyond this and within charter limits, like other owners of private property, it may control its own affairs."

In *Chicago, M. & St. P. R. R. Co. v. Wisconsin,* 238 U. S. 491, 59 L. Ed., 1423, Mr. Justice Lamar, speaking for the court on the power to regulate the making of berths in sleeping cars, said:

> "The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management, or the taking of the carrier's property without compensation."

In *Reagan v. Farmers Loan & Trust Company,* 154 U. S. 362, 38 L. Ed. 1014, we find this declaration:

> "This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of govern-

ment, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *Wilson v. New*, 243 U. S., 332, 61 L. Ed. 755, a case which bordered so close on confiscation as to cause this court to decide it by a bare majority, this principle, that railroad property although devoted to a public use is private property, was never questioned or disputed. The Chief Justice, in the majority opinion, said:

> "That regulation gives the authority to fix for interstate carriers a reasonable rate, *subject to the limitation* that rights of property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions." (Italics ours.)

And, in the dissenting opinion Mr. Justice Pitney said, speaking of railroads:

> "The devotion of their property to the public use does not give the public an interest in the property, but only in its use."

In the notable opinion of Mr. Justice Hughes, in the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, 1555, 1564, we find the following:

> "The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service

itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, *but to the right to receive just compensation for the service given to the public.* * * *

"The property is held in private ownership and it is that property and not the original cost of it, of which the owner may not be deprived without due process of law." (Italics ours.)

The same principle has been reiterated by this court at the last term. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (43 Sup. Ct. 544, 67 L. Ed. Adv. Ops. 619, decided May 21, 1923), Mr. Justice McReynolds, speaking for the court, after quoting a portion of the language we have just taken from the opinion in the Minnesota Rate Case, said:

"It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership."

The same principle was also involved and adhered to in the later cases of *Georgia Railway & Power Company v. Decatur,* 43 Sup. Ct. Rep. 613; 67 L. Ed. Adv. Ops. 669, and *Georgia Railway & Power Company v. College Park,* 43 Sup. Ct. Rep. 617, 67 L. Ed., Adv. Ops. 673, both decided June 4, 1923.

It is well settled by the decisions of this court that the income from private property becomes likewise private property immediately as it accrues; that it is in fact the capacity of private property to produce income

which gives it its chief value, and that the destruction of this attribute is to that extent a destruction of the private property affected, and, a seizure of this attribute is necessarily a seizure of at least a part of the private property involved.

In *Branson v. Bush,* 251 U. S., 182, 64 L. Ed. 215, 219, the court quoted, with approval, the following excerpt from the opinion in *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Backus,* 154 U. S., 439, 38 L. Ed. 1041:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. *There is no pecuniary value outside of that which results from such use.* The amount and profitable character of such use determines the value." (Italics ours.)

In *Omnia Commercial Company v. United States,* 43 Sup. Ct. Rep. 437, 67 L. Ed., Adv. Ops. 468, decided April 9, 1923, this court said:

> "In the Monongahela Navigation Company Case (148 U. S. 312, 37 L. Ed. 463) the property which was taken was a lock and dam built by the company pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise therefore was not merely a contract in respect of property taken, but was an integral part of it; and
>
> "'So before this property can be taken away from its owners the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take toll,' the lock and dam constituting, in effect, a going concern

whose value was *of course* affected by what it would produce." (Italics ours.)

In *South Utah Mines & Smelters v. Beaver County*, 43 Sup. Ct. Rep. 577, 67 L. Ed. Adv. Ops. 608, decided May 21, 1923, Mr. Justice Sutherland, speaking for the court, said:

> "The value of property bears a relationship to the income which it affords. If it be property whose production is uniform and of indefinite duration, the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value."

In addition to what was quoted above, the court in *Monongahela Navigation Company v. United States, supra*, said:

> "It is also suggested that the government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation with such a franchise to take tolls as it chooses to give. *But this franchise goes with the property*, and the Navigation Company, which owned it, is deprived of it. The government takes it away from the Company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tanglible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not

merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." (Italics ours.)

It must be borne in mind that this appellant acquired from the State of Texas, by the same charter which authorized it to construct and operate a railroad, the right to exact tolls for services rendered by that property.

By Article 6541 of the Revised Statutes of Texas, 1911, under which appellant was organized, it was provided, with reference to railroad companies organized under such laws, that:

> "Such corporation shall have the right to receive and convey persons and property on its railway by the power and force of steam or by any mechanical power."

Article 6543 reads as follows:

> "Such corporation shall have the right to regulate the time and manner in which passengers and property shall be transported, *and the compensation to be paid therefor*, subject nevertheless to the provisions of this or any other law that may hereafter be enacted."

And by sub-division 2 of Article 6654, defining the powers and duties of the Railroad Commission of Texas, it was provided that:

> "The Commission shall have the power and *it shall be its duty* to fix to each class or subdivision of freight a reasonable rate." * * *

Article 6618 reads in part as follows:

> "The passenger fare upon all railroads in this State shall be three cents per mile, with an allow-

> ance of baggage to each passenger not to exceed one hundred pounds in weight. * * * "

The franchise of this appellant, therefore, to exact tolls for the service rendered by it, is, under the doctrine of the Monongahela Case, an inseparable part of its property, and a taking of any part of that franchise, such as will necessarily result from the enforcement of this law and these orders of the Commission, will obviously result in depriving appellant of its private property.

In *Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota,* 134 U. S., 418; 33 L. Ed. 970, it was said:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, *in substance and effect, of the property itself* without due process of law, and in violation of the Constitution of the United States." (Italics ours.)

This principle, indeed, that the income derived from private property is a part of the property itself; that the right to employ private property for productive uses and to enjoy the fruits of the same is the *property* protected by the Constitution; and that a deprivation of the income from such property is a taking of the owner's property, is the fundamental principle upon which this court has based its decisions in the great rate cases that have come before it. In all of those cases where rates have been enjoined, or have been sought to be enjoined, upon the ground that they were confiscatory, such as *Reagan v. Farmers Loan &*

Trust Company, 154 U. S., 362, 38 L. Ed., 1014; *Minnesota Rate Cases,* 230 U. S. 352, 57 L. Ed., 1511; *Knoxville v. Knoxville Water Company,* 212 U. S. 1, 53 L. Ed., 371; *Stone v. Farmers Loan & Trust Company,* 116 U. S. 307, 29 L. Ed. 636, and *Northern Pacific R. R. Co. v. North Dakota,* 236 U. S. 585, 59 L. Ed., 735, the court has constantly adhered to the principle that the owner of property, which he employs in the public service, is entitled under the Constitution to charge *a reasonable rate for the services rendered,* and that to take this right away from him is to deprive him of the property itself. It is wholly unnecessary to accumulate citations of these cases. Indeed, the principle is so well settled that we not infrequently find the court deciding cases upon the basis of that doctrine without a full explanation of it or with a mere passing assumption of its existence and effect.

We find the appellant then, at the time of the passage of this law (February 29, 1920), and on the dates when the Commission entered these orders, in full possession and in absolute ownership of a railroad property consisting in part, under the decisions of this court and the charter issued to appellant by the State of Texas, of a franchise to collect reasonable rates for the employment of that property in the public service. This was alleged in the bill, was substantially admitted by the answer of the Interstate Commerce Commission (R. 35-39), and was conclusively admitted by the motion of the United States to dismiss the bill. Hopkins, Ann. Eq. Rules, 3rd Ed., 185-187; Eq. Rule 29; *United States v. Railway Employes Department,* 286 Fed. 228, 230; *Krause v. Brevard Tannin Co.,* 249 Fed. 538, 548; *Stromberg v. Holly,* 260 Fed. 220.

In the case last cited, the court said:

> "It is elementary that on such motion the allegations of material facts which are well pleaded in the bill must be accepted as true for the purposes of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner and called up and disposed of by the court before final hearing."

If the effect of this Act, therefore, and of the orders of the Commission, is to take any part of the earnings accruing to appellant by reason of the employment of its property in the public service, at reasonable rates, they are clearly confiscatory, repugnant to the Fifth Amendment, and void. That they can have no other effect is plain.

III.

The provisions of the transportation act for the disposition of net railway income are not regulation of Interstate Commerce, but a direct taking of the private property of the carrier, and of the liberty of the use of the property of the carrier, without due process of law and without just compensation; and are an invasion of the property rights of the carrier, and are in violation of the Fifth Amendment of the Constitution of the United States.

This main proposition naturally divides itself into a multiplicity of questions. We have tried to segregate these questions and discuss them separately, with the authorities pertinent to each point. This has to a degree made repetition to a considerable extent unavoidable. Some of the propositions run so closely parallel that we have in some instances used the same authority,

and the same language in the same authority, for the support of two or more propositions. This has made the brief much more extended than upon first examination would appear to be necessary, but it has seemed to us that some repetition on separate sub-propositions is less objectionable than continual reference to other parts of the brief. The subject-matter is of such vast importance, involving not alone this appellant, but every carrier in the country which may, for a period of five, ten, or twenty-five years, be unable to pay its fixed charges, and then by some fortuitous chance have for some one year an excess net income under the act, in which case its property may be taken just as it is proposed to take the property of appellant, notwithstanding the fact that for all of the other years of the period its income be wholly insufficient for its actual needs.

In other words, it is not impossible for any railroad in the country, however poor its general income may be, to have some one year in its history that would be seriously affected by the application of this law. It therefore becomes important to every carrier in the country.

Prior to the adoption of the transportation act the railroads of the country had been under Federal control for more than two years. We think we may say that the public was convinced that Federal control had been a failure. The expense was enormous, the labor of the country was disorganized, the public was dissatisfied, and investors in railroad securities felt that their properties were jeopardized.

The dominant thought before Congress at the time was two-fold: First, to release the railroads of the country from governmental operation, and, second, to

prevent the transportation system of the country from being wrecked.

The credit of the roads was bad; investors in railroad securities under existing conditions could not be found, and it was considered most unwise to return the roads to the owners without such safeguards as would save the transportation systems of the country from ruin. The conditions of the country at the time are extensively discussed in the opinion of the court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 66 L. Ed. 371.

It became necessary to provide new policies, new regulations, and to secure increased revenue for the railroads.

The Congress fully recognized this fact, and we quote an extract from the Senate Committee report No. 304, on Senate Bill 3288, as follows:

> "In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon

the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make, and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment."

Said report further states:

"It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent., another 4 per cent., and another 6 per cent., another 8 per cent., and others still more. The bill fixes a standard of excess income and requires the carriers which receive an excess income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report." * * * "If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent. upon the value of its property, but we have a thousand railways; and rates for transpor-

tation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is, therefore, in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion."

That Congress was initiating a new and a different policy than any which had theretofore been recognized by national legislation, was expressly declared by this court in the *New England Divisions Case* (*A. C. & Y. R'y Co. v. United States,* 43 Sup. Ct. Rep. 273), in the following language:

"The transportation act 1920 introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S., 563, 585, 42 Sup. Ct. 232, 66 L. Ed. 371.

"Theretofore the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates.

"The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designated to secure a fair return on capital devoted to the transportation service. Upon

> the Commission new powers were conferred, and new duties were imposed."

The contention which is urged in the report, to the effect that it is within the competence of "Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property," overlooks the elemental considerations of the powers of the Congress under the Constitution.

A carrier has no right to collect a rate for a service that is not in and of itself reasonable for that service. The carrier has no right to demand of the shipper to pay more than is reasonable for the service. The Commission has no right to fix a rate that is not reasonable for the service, and the Congress has no power to compel the shipper to pay more than is reasonable for the service, nor to take from the shipper for governmental purposes anything that is more than reasonable for the service, and therefore the carrier has no right to collect an excess service charge and hold the excess as trustee for the United States.

These principles are expressly recognized by the transportation act itself. Paragraph 17, of Section 15-A, declares that:

> "The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates."

If the rate for the service charged by the carrier fall within this category, the shipper is entitled to repara-

tion to the amount of the excessive overcharge, notwithstanding it may already have been paid by the carrier to the government.

If the earnings of the carrier arise from reasonable charges for the service rendered, it is inconceivable that such earnings are not the private property of the carrier; and if the private property of the carrier, they cannot, by congressional declaration or otherwise, be made a trust fund for the United States or for any other purpose.

The power of Congress is to regulate commerce. There are many incidents of this regulation that may be exercised by Congress, but the taking of property of the carrier is not a regulation of commerce. It has no relation to the regulation of commerce, other than that it may result to a prosperous and economical carrier from a system of rates prescribed or authorized by the Commission. Sections 5 and 6 do not regulate. They take the income of the carrier already earned. They appropriate one-half of it to the government, and the other half place under a perpetual restriction that can be used only for limited purposes, and the limitations amount as much to a taking of the carrier's property as the appropriation of it direct to the government.

(A). When the appropriation of private property is the necessary effect of an act of Congress, which provides neither for compensation nor for a judicial inquiry to ascertain the damages, as is the case with Section 15a, that act and, a fortiori, all administrative orders made to enforce it, are void for repugnance to the Fifth Amendment, because lacking in due process and in provision for just compensation. The method of appropriation is immaterial. A legislative declaration of

trust which has this effect is no more effective than a legislative writ of execution or a legislative grant of land privately owned.

By paragraph (5) of Section 15a of the Interstate Commerce Act, after reciting the impossibility of establishing uniform rates upon competitive traffic which will adequately sustain all of the carriers engaged in that traffic without enabling some of them to receive an income substantially in excess of an alleged fair return upon the value of the property, the Congress declared:

> "That any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

In the succeeding paragraph it was provided that:

> "One-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission. * * * " (41 Stat. 489.)

We have, then, a declaration by the Congress that, upon certain conditions, (the receipt by a carrier subject to the act of a so-called excessive return under rates fixed by the commission at such figure as to enable all such carriers as a whole to earn the so-called standard return of 6 per cent.) a prescribed portion of such excess shall be deemed to be held in trust for the use and benefit of the United States; the trust to be terminated by payment to the beneficiary within a stated period, as provided in paragraph (6).

At the outset it may be remarked that this is a most unusual and most uncertain sort of a trust. A trust as ordinarily understood must, in order to be valid, attach to definite and specific property; must attach at a fixed time and be created for the benefit of the owner or his nominees. But here, until the books are closed for the year, no one can tell whether any trust exists.

Assume that a railroad reaches the 15th day of December with an aggregate net return of exactly 6 per cent. upon the value of its property. If that railroad during the remainder of the year earns its expenses, no more, no less, the rates for the first 11 1-2 months of the year were just and reasonable, according to those who would sustain the validity of this act as a rate fixing measure, and no trust exists. But, if the carrier happens to earn some additional net income during the last half of December, it is assumed that the public has been subjected to the assessment of extortionate rates, and that the net earnings are, in part, impressed with a trust for the benefit of the United States representing the public, notwithstanding the rates in effect during the last half of the month may have been precisely the same rates which were in effect during the remainder of the year; the conditions of transportation the same and the additional earnings brought about solely by reason of unusually efficient management or by some fortuitous event.

It must be observed that the trust is not impressed in such case upon the revenues derived in the last 16 days of the year, but upon the net income of the carrier *for the entire year* to the extent that it exceeds 6 per cent. of the value of the property.

In the case assumed, the manager of the property might be enabled, in the exercise of entire good faith and wise discretion, either to avoid a trust or to cause it to attach, by increasing his operating expenses through the medium of additional, but not unwise or dishonest, maintenance, or by deferring his maintenance charges to an extent not sufficient to cause a material injury to the property. But however lacking this trust may be in the qualities of an ordinary equitable trust, the essence of it, so far as concerns the owner of the property, is the requirement that within four months after the close of the year it must be terminated by a delivery of the trust property to the beneficiary. This has been said to be the simplest form of a legislative act lacking in due process, viz., one by which the property of one man is taken from him by legislative edict and title thereto vested in another.

It is well, at this juncture, to call attention to some loose expressions appearing in the act, which have crept more or less unnoticed into the public press and the public thought. The act refers to an income *in excess of a fair return upon the value of the property* devoted to the public service, but, as will be shown later, this income so far as the appellant is concerned, was earned upon a level of rates fixed by the State and Federal Commissions in the exercise of their power to prescribe *reasonable* rates.

The thought has evidently been that it is improper for a carrier to earn a large return upon the original cost or reproduction cost of its physical property, without respect to the inherent reasonableness of each charge collected for each service performed. But it has been often

held, as shown by the cases cited in this brief, that cost is no measure of value, and that value, which is the property protected by the Constitution, depends more largely upon productiveness and earning power.

But to return to the trust theory, whence comes the power of Congress to make this declaration of trust? The power is defended on the proposition that it is only a part of the machinery for fixing rates. It is said that there are two methods of fixing rates; one, by way of prophesy whereby the rate-fixing power, looking into the future and exercising its discretion, estimates what basis of rates will thereafter be just and reasonable; the other, historical, accurate and scientific, by which a provisional basis of rates is established in advance, sufficiently high to be just in any event to the utility, and is later adjusted in the light of the actual income derived from the business actually done. It is contended that this latter method is the one which has been employed in Section 15a. Such, obviously, is not the case. Although the subject will later be discussed more fully it may be pointed out here that the excess is not to be returned to the persons who paid and bore the excessive provisional charges; and the act itself does not authorize the provisional charges to be excessive, but directs that they be fixed by the Commission "in the exercise of its power to prescribe just and reasonable rates." It is perhaps trite to remark that rate regulation can not be indulged in to enrich the treasury of the government. Rate regulation, as it has been practiced in this country, is in theory at least, designed to protect shippers from unreasonably high rates and to protect carriers from unreasonably low rates. The theory that

Section 15a merely amounts to a method of fixing rates, does not harmonize with either of those purposes.

We are, therefore, forced to return to the original statement that Congress in this act has directed the railroads to deliver a part of their private property to one of the agencies of the government. Whether the law is valid because this is to be accomplished through the medium of this statutory declaration of trust would seem to be a question easily solved. The Fifth Amendment provides broadly that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation. As the court said in Hurtado v. California, 110 U. S., 516, 28 L. Ed. 232, 237:

> "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainer, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; * * * The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.
>
> "In this country different Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. *They are limitations upon all the powers of government, legislative as well as executive and judicial.* * * *
>
> "Applied in England only as guards against ex-

ecutive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation." (Italics ours.)

By the Fifth Amendment Congress is therefore prohibited from taking private property without due process of law and without just compensation, whatever the means or the method.

Numerous cases have been before this court in which it has been held either that the law was invalid because its enforcement would deprive persons of their property without due process of law or that private property has been taken so as to create the obligation to pay just compensation. It is unnecessary to review any of those cases for the present purpose, but it may be said without fear of contradiction that no matter what the circumstances, no matter what the method employed, no matter what means were adopted, and no matter what the purpose to be served, this court has uniformly held in every case that its concern was only whether there was *an actual taking of the property.* Whenever it was determined that private property would be taken without due process of law, this court has prevented it, and whenever this court has determined that private property had been taken without just compensation it has either nullified the taking or made due provision for the payment of damages.

(B). The general level of rates, State and Interstate, under which appellant's earnings accrued to it between March 1, 1920, and December 31, 1921, must be assumed to be just and reasonable and may not be assumed to be excessive.

The manner in which this level of rates came to be fixed is described in appellant's Exhibit No. 5, as follows:

> "So far as the railway operating revenues of said company were derived from intrastate transportation conducted wholly within the State of Texas, they were based upon rates established, promulgated or approved either by the Railway Commission of Texas or by the Interstate Commerce Commission, as evidenced by the following statement. Prior to the orders of the Interstate Commerce Commission in the case of Railroad Commission of Louisiana v. Aransas Harbor Terminal Railway Company, et al., 48 I. C. C., 312, and Railroad Commission of Louisiana v. St. Louis Southwestern Railway Company et al., 23 I. C. C. 31, 34 I. C. C. 472, commonly referred to as the Shreveport Case, the order in connection with the report published in 48 I. C. C., 321, being dated January 22, 1918, all of the transportation conducted intrastate in the State of Texas was conducted at rates established and promulgated by the Railroad Commission of Texas. In its said order of January 22nd, 1918, Docket No. 8418, the Interstate Commerce Commission prescribed or approved rates upon all classes and commodities, except a few commodities to be below mentioned, for application to intrastate traffic by railroad within the State of Texas. Rates upon the few commodities excepted from the order of the Interstate Commerce Commission in said proceeding had been agreed upon between the complainant, the carriers, representative shippers and the Railroad Commission of Texas, and were promulgated by an order of the Railroad Commission of Texas, and were for that reason excepted from the order of the Interstate Commerce Commission. Effective June 25, 1918, a general increase in rate, including all rates applicable to intrastate traffic in Texas, became effective by order of the Director General

of Railroads of the United States, averaging approximately 25 per cent., and later the intrastate rates within the State of Texas were further increased by approximately 35 per cent. under the order of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C., 220, the order in the proceeding last mentioned being dated July 29, 1920, and took effect on August 26, 1920.

"Application was promptly made after the decision of the Interstate Commerce Commission in the proceeding last mentioned to the Railroad Commission of Texas for an express order authorizing the increase of the intrastate rates within the State of Texas to the level approved and directed by the Interstate Commerce Commission in said proceeding. This order was refused by the Railroad Commission of Texas which authorized an increase of 33 1-3 per cent. instead of the 35 per cent. authorized by the Interstate Commerce Commission. The Texas carriers thereupon increased the classes and commodities involved in the above mentioned Shreveport Case 35 per cent., but only advanced the rates on those commodities which had been excluded from the order in the Shreveport case 33 1-3 per cent. All the foregoing has reference to freight rates. Up to the time of the decision by the Interstate Commerce Commission in Ex Parte 74, the passenger rates in Texas had, except in a few instances relating to party and excursion rates and the like, been 3 cents per mile as fixed by Article 6618 of the Revised Statutes of Texas of 1911. The said order of the Interstate Commerce Commission authorized and approved an increase of passenger rates in the State of Texas to 3.6 cents per mile and also authorized a surcharge, to be collected from passengers riding in sleeping, parlor or chair cars equal to 50 per cent of the sleeping car fare, parlor car fare or chair car fare. The application of the Texas carriers to the Railroad Commission of Texas, next above referred to, also requested au-

thority to increase the passenger rates to the levels just mentioned and this part of the application was also refused by the Railroad Commission of Texas.

"Thereupon, the principal Texas carriers instituted a proceeding before the Interstate Commerce Commission, No. 11764 upon the docket of said Commission, charging that the failure of the Railroad Commission of Texas to authorize the same increases in intrastate rates in Texas as had been authorized by the Interstate Commerce Commission in Ex Parte 74, and the resulting discrepancy in the rates, intrastate as compared to interstate, constituted a discrimination against interstate commerce which the Interstate Commerce Commission was requested to order removed. On February 12, 1921, the Interstate Commerce Commission issued its report and order in said proceeding, 60 I. C. C., 421, finding that the discrimination charged did in fact exist and directing its removal and prescribing the same rates, fares and charges for application to intrastate traffic and travel in Texas as had been authorized for the group in which said State is located in Ex Parte 74, and the rates, fares and charges so prescribed, except in some minor and negligible instances, where expressly authorized by the Interstate Commerce Commission, continued to be charged upon intrastate freight and passenger traffic in Texas during the remainder of the year 1921.

"The revenue derived by Dayton-Goose Creek Railway Company between March 1, 1920, and December 31, 1921, from interstate and foreign traffic, was derived and earned on account of the transportation of traffic which, for the purposes of this affidavit, may be divided into two classes: (a) traffic upon which rates had been prescribed or approved by express orders of the Interstate Commerce Commission. All interstate traffic covered by the orders of the Interstate Commerce Commission in the Shreveport Case cited above, and all interstate traffic upon which the Interstate Commerce

Commission had fixed rates in specific complaints are instances of this class of traffic. (b) Traffic which moved upon rates, the basis of which have been in existence for many years without substantial and successful attack.

"The basis of the greater part of these rates had been in effect to and from points in Texas for many years and in my opinion these rates, taken as a whole, were reasonable. This opinion of mine is based not only upon my traffic experience in connection with those rates but also upon the presumption that rates which have been in existence during a long period of time are presumptively reasonable. See Gamble-Robinson Commission Co. v. St. L. & S. F. R. R. Co., et al., 19 I. C. C., 114, Commercial Club of Omaha v. Southern Pacific Company et al., 20 I. C. C., 631." ((R. 59-61.)

Counsel for the Commission has questioned the correctness of the statement in the petition that in Ex Parte 74, the Commission "fixed" rates and it is contended that the increases in rates which followed that proceeding were merely "authorized" by the Commission. Under the law, Section 15a, paragraph (2), it is made the duty of the Commission to "initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance * * * earn * * * a fair return." It being the affirmative duty of the Commission under this mandate to fix rates by initiating them or by establishing or adjusting them and the carriers having before them the thought that unless their management was efficient they would not be entitled to earn the full amount which

the act fixes as a fair return, candor would seem to compel the view that for all practical purposes these rates were absolutely fixed by the Commission subject to the obligation of the carriers to correct maladjustments.

But for our purpose it would seem to make no difference whether the rates were fixed or were merely authorized because in either event they must have received the express approval of the Interstate Commerce Commission and under all of the authorities commencing with the case of *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S., 426, 51 L. Ed. 553, 27 Sup. Ct. Rep., 350, the discretion of the Commission with respect to such administrative matters is not subject to review by the courts.

Furthermore, it would appear that the very paragraph of the law under which the Commission acted in issuing its order in Ex Parte 74 (Section 15a, paragraph 2) gives the complete, definite and final answer to any contention that the rates fixed by the Commission in that proceeding were excessive or unreasonably high.

Under that paragraph of the law the Commission is directed to so initiate, modify, establish or adjust rates *"in the exercise of its power to prescribe just and reasonable rates."* Whence does this power to prescribe just and reasonable rates arise?

By the first paragraph of Section 12 the Commission is authorized and required to enforce the provisions of the Interstate Commerce Act. Under Section 1 it is made the duty of every common carrier subject to the act to provide transportation; to establish just and rea-

sonable rates, fares and charges; to provide through routes and just and reasonable rates and charges applicable thereto and to fix just and reasonable divisions thereof; to establish just and reasonable classifications; and every unjust and unreasonable charge, rule, regulation, classification and practice is prohibited and declared to be unlawful. Sec. 2 defines and prohibits unjust discrimination, and Sec. 3 prohibits the giving of any undue or unreasonable preference or advantage. By Section 15 the Commission is expressly vested with the power, after hearing, "to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Without attempting to trace through the act all of the powers of the Commission, it is obvious that this mandate to fix rates in the exercise of its power to prescribe just and reasonable rates, must be read in the light of the other portions of the Interstate Commerce Act. What was said by the court in *Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, 42 Sup. Ct. Rep., 281, is plainly applicable here:

> "Although found in the Transportation Act these paragraphs are amendments of the Interstate Commerce Act and are so styled * * * Being amendments of the Interstate Commerce Act they are

to be read in connection with it and with other amendments of it."

It was never suggested prior to the passage and approval of the Transportation Act that the power of the Interstate Commerce Commission to fix just and reasonable rates involved the power to fix excessive rates, but counsel now assert that the rates fixed are excessive although under paragraph (2) of Section 15a the power to adjust, initiate, or fix the rates under which these alleged excess earnings are to be collected is *the same power* which the Commission had previously exercised with respect to specific rates.

Far from being excessive it is in proof here that the rates fixed by the Commission in Ex Parte 74 fell far short, so far as the Western District is concerned, of the standard set by law. From the affidavit of Dr. Julius H. Parmelee, Director of the Bureau of Railway Economics (Appellant's Exhibit No. 3, R. 45-49), it appears that, taking the carriers of the Western Group or District as a whole, the rate of return on their book value was approximately 1.44 per cent. for the last ten months of 1920 and approximately 3.41 per cent. for the year 1921. Yet the law required the Commission to so establish the rates that carriers as a whole in each group should earn a fair return, which for a two-year period commencing March 1, 1920, was fixed by paragraph 3 of Section 15a at "a sum equal to five and one-half per centum of such aggregate value, but may in its discretion add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision, in whole or in part, for improvements, betterments or equipment which according to the accounting

system prescribed by the Commission are chargeable to capital account."

So far as rates may be involved which were fixed by the Railroad Commission of Texas, it is entirely sufficient to remark that under Article 6654 of the Revised Statutes of Texas of 1911 the Texas Commission "shall have power and it shall be its duty to fix to each class or subdivision of freight a reasonable rate," and the adult Texas passenger fares were fixed at three cents per mile by Article 6618 of the Texas Statutes. Article 6656 of the Revised Statutes of Texas, 1911, reads as follows:

> "In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by Articles 6657 and 6658 of this chapter."

We submit therefore that every consideration compels this court to view the rates, fares and charges under which the appellant earned the income shown on the reports involved in this case as non-excessive, and that there is no basis of law or fact upon which court or counsel may predicate an assumption that the rates upon which this income was earned contained any excess whatsoever above what was just, fair and reasonable, except perhaps in those instances where the shippers who paid the rates are entitled under the Interstate Commerce Act to secure from the Interstate Commerce

Commission an order of reparation requiring the carrier to refund to the party damaged any excess which the Commission may find to have existed. Even here we must not overlook the proposition firmly established by *Texas & Pacific Railway Company v. Abilene Cotton Oil Company, supra,* that the questions of whether any excess did exist, and if so how much it was, have by law been committed exclusively to the determination of the Interstate Commerce Commission, and that until the Commission speaks on this subject in a proceeding where its powers are properly called into play, neither this court nor any other court has power to enter upon a consideration of either of those questions.

All States, or substantially all, have public utility Commissions, charged with the duty of representing the public, and of seeing, insofar as the States may exercise that power, that every individual rate and every system of rates upon every railroad serving the State is reasonable as between the public and the carrier. How well and diligently these duties have been prosecuted is evidenced by the fact that the reports, State and national, are filled with cases where such questions are involved, either by actions on the part of regulatory bodies to compel carriers to reduce rates, or on the part of carriers to resist reductions.

In addition to this, the Interstate Commerce Act further provides machinery by which every shipper, every community of shippers, every body of organized shippers representing any special interests in the commerce of the country, every organization, corporate or voluntary, every city and town and every community, may have its action against all of the railroads of the coun-

try in a single proceeding to determine the reasonableness of rates upon any given commodities, or to remove discriminations between localities, or to test any other rate, classification or adjustment which, in the opinion of the complaining parties, operates against their interest. The books are full of cases of proceedings of this character, and an army of examiners is engaged in gathering facts for the Commission upon which to determine complaints, and the Commission is constantly engaged in granting or refusing relief therein.

But this is not all. If any shipper believes, when he ships any commodity by rail in interstate commerce, that the rate is too high, ample and sufficient legal machinery is provided under which he may not only test that rate and have a proper rate fixed for the future, but if the question be determined in his favor, he may secure an order of reparation and recover back the full amount of the unwarranted exaction. That shippers have for years been availing themselves of these provisions of the act is evidenced by even a casual examination of the Commission's reports and the decisions and dockets of the Federal Courts.

Consequently, it seems indisputable that the old rule that rates are presumed to be reasonable until the contrary is affirmatively made to appear is greatly reinforced through the constant, active and militant efforts of shippers and public utility commissions, throughout the country, to reduce these rates to the lowest possible level.

(C.) The restrictions placed by Section 15a upon the use of the moneys thereby required to be placed in a reserve fund constitute a taking of property under the

Fifth Amendment, because an undue limitation upon the use of property is equivalent under the Constitution to a seizure of the property.

By the provisions of Section 15a a reserve fund is required to be built up out of one-half of the excess earnings until it equals 5 per cent of the value of the carrier's property devoted to the service of transportation, and this fund, under the terms of the act, may be used only for certain limited and restricted purposes. Paragraph (7) of said Section reads as follows:

> "For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for one year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose."

In *Branson v. Bush,* 251 U. S., 182, 64 L. Ed. 215, 219, the court quoted with approval the following excerpt from the opinion in *C. C. C. & St. L. R. Co. v. Backus,* 164 U. S., 439, 38 L. Ed. 1041, 1046:

> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use present and prospective, actual and anticipated. *There is no pecuniary value outside of that which results from such use.*"

The same principle is illustrated in *Brooks-Scanlon Lumber Company v. Railroad Commission,* 251 U. S., 396, 64 L. Ed. 323, in which the court held that a State Railroad Commission could not require a lumber company to continue to operate a railroad at a loss, saying:

> "The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it."

In *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 20 L. Ed. 557, Justice Miller, speaking for the court, said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The view expressed in that case was approved in *Kansas Natural Gas Company v. Haskell,* 172 Fed. 545, which was affirmed by this court as *West v. Kansas Natural Gas Company,* 221 U. S., 229, 55 L. Ed. 716. In that case it was held that the Oklahoma Statute, which prevented the removal of natural gas out of the State where it was produced, so interfered with the use and disposition of the property held in such gas by the owners thereof that the statute amounted to a taking of such property without due process of law and was therefore unconstitutional and void.

The decision of the case in this court was based mainly upon the proposition that the act constituted an interference with interstate commerce; but, that the court did not overlook the further fact that it was invalid because, in violation of the Fourteenth Amendment, by its interference with the use and disposition of property, it would operate to deprive the owner of such property without due process of law, is evidenced by the following brief quotation from the opinion:

> "We have reviewed the cases at length, as they demonstrate the unsoundness of the contention of appellant, based upon the right to conserve * * * the resources of the State, and that the statute finds no justification in such purpose for *its interference with private property* or its restraint upon interstate commerce." (Italics ours.)

Again, at page 254, the court said, that the Statute which was held invalid "does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property—the right to dispose of it." * * *

In *St. Louis v. Hill*, 22 S. W. 861, the Supreme Court of Missouri said:

> "This contention brings into prominence the true import of the word 'property.' The general result of various definitions of the term is that it is the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, whether real or personal. 1 Bl. Comm. 138; 2 Aust. Jur. 817, 818; 19 Amer. & Eng. Enc. Law, 284, and cases cited; Lewis, Em. Dom., Secs. 57-59; Eaton v. Railroad Co., 51 N. H. 504; Thompson v. Improvement Co., 54 N. H. 545; Wynehamer v. People, 13 N. Y. 378. Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things however, though subjects of property, are, when coupled with possession, but the indicia, the visible manifestations of invisible rights, 'the evidence of things not seen.' Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property."

That was a case in which the court declared invalid an ordinance establishing a building line on a boulevard. The effect was that the owner of a lot, which was not actually taken, was prohibited from building upon a portion of his land and was thereby deprived of its ordinary use without any proceedings for the condemnation of that part of the lot, the use of which was prohibited. Substantially the same conclusion was reached by the Supreme Court of Texas in *Spann v. City of Dallas*, 235 S. W., 513, 516, in which a city ordinance, prohibiting the erection of a business building in a residence

district and thus limiting the use of property, was declared unconstitutional.

The Supreme Court of Georgia in *Carey v. Atlanta,* 143 Ga. 192, 84 S. E. 456, quoting from *State v. Darnell,* 166 N. C. 300, 81 S. E. 338, said:

> "The *jus disponendi* has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away."

To the same effect is *Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota,* 134 U. S., 418, in which it was declared that:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, *in substance and effect, of the property itself,* without due process of law and in violation of the Constitution of the United States." (Italics ours.)

In *United States v. Cress,* 243 U. S. 316, 61 L. Ed. 746, 753, 754, the court said:

> "It is the character of invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking,"

and, quoting from the opinion of Mr. Justice Brewer in *United States v. Lynah,* 188 U. S., 445, 47 L. Ed. 539, 538, the court further said:

> "While the government does not directly proceed to appropriate the title, yet it takes away the use

and value; and when that is done it is of little consequence in whom the fee may be vested."

The court, after concluding this quotation, continued:

"There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his title to the land."

By paragraph (7) of Section 15a the carrier is prohibited from drawing upon this reserve fund, except for the purpose of paying interest or dividends upon its securities or rent for leased roads, and may not draw upon it for those purposes except "to the extent that its net railway operating income for one year is less than a sum equal to six per cent. of the value" of its railroad property. If the carrier be fortunate enough to continue to earn at least six per cent. upon the value of its property, the plain effect of this part of the act is to place this reserve fund of the carrier (which is concededly the private property of the carrier, which no one claims as the proceeds of any tax or as the subject of any trust) in a kind of financial cold storage, from which the owner is not permitted to withdraw it except for certain limited and specific purposes and then only upon condition that the carrier's earnings for the year fall below six per cent. of the values of its property. No matter how great the need for additional power or equipment, this fund can not be resorted to for that purpose. Even if the revenues of the carrier fall so low

in subsequent years as to create a deficit, not a single tie can be bought with this reserve fund, not a yard of ballast, and not a ton of coal. The property may be going to ruin for lack of maintenance, the current earnings may be wholly insufficient to provide that maintenance and yet this reserve fund, equal to five per cent of the value of its entire property, could not be employed, if this act is valid, to relieve the company's distress.

Even if it should be said, therefore, that it is within the province of Congress, under its power to regulate commerce, to provide against the financial embarrassments of the future by requiring that a part of the prosperity of the present be set aside in a reserve fund, that contention could not justify the severe and stringent limitations imposed here upon the use of private property. The purposes for which the reserve fund may be drawn upon, are fixed in such an arbitrary way they have so little connection with the real exigencies which the business may develop, and are so wholly lacking in reasonable basis for classification that they cannot be said to be even remotely related to any of the provisions of the "due process" clause, which requires equal and impartial legislation and prohibits all arbitrary, tyrannical and capricious legislative action.

(D.) The "due process" clause of the Fifth Amendment requires equal legislation affecting generally and in like manner all those in similar circumstances, and to this extent the Fifth Amendment, which does not expressly contain an equal protection clause, is as broad as the Fourteenth Amendment, in which the principle is expressly stated.

Taylor, in his work on "*Due Process*," Section 134, says:

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied."

"The primary purpose of the founders of American constitutional law was to wipe out the entire system of legislative despotism over life, liberty and property, based in England not only upon a denial of the right of due process, but also upon the denial of the principles demanding generality and equality in the laws. Their effort was, first, to subject all state power—executive, legislative and judicial—to the yoke of constitutional limitations consisting of epitomies of English constitutional law as it existed in 1776; *second*, to further limit the legislative power with the requirement that all laws must be equal and general. The end in view has been thus expressed in Sears v. Cottrell, 5 Mich. 251: 'By the law of the land we understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the Constitution, or clearly coming within the general scope of legislative power, would be in conflict with this part of the Constitution, and for that reason, if no other, be void.' "

"It was easy enough to give scientific definition to the new American ideal of equal laws. The practical difficulty has been to convert that ideal into a working rule capable of application to existing conditions. In practice it has been necessarily modified by two important exceptions: *First*, where the State Constitution does not expressly limit the power of the legislature to pass special or local laws

(see Waite v. Santa Cruz, 184 U. S. 302), it may pass laws confined in their operation to particular localities without offending against the constitutional limitation in question; *second,* in the language of Giozza v. Tiernan, just cited, 'Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one against another class. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Home Ins. Co. v. New York, 134 U. S. 594; Pacific Exp. Co. v. Seibert, 142 U. S. 339. And due process of law within the meaning of the amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. Leeper v. Texas, 139 U. S. 462.''

"Such, then, is the nature of the fundamental requisite of due process, so far as generality and equality of laws is concerned, which, with its inevitable exceptions, is an element inherent in due process in its American form. As such it existed long before the adoption of the Fourteenth Amendment, and is therefore something entirely separate and apart from the guaranty embodied in its provision that no State shall 'deny to any person within its jurisdiction the equal protection of the law.' ''

In *Leeper v. Texas,* 139 U. S. 462, 35 L. Ed. 225, 227, the court said:

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of

powers of government unrestrained by the established principles of private right and distributive justice."

In *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 601, the court said:

> "Due process of law within the meaning of the (14th) Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In *Cass Farming Co. v. Detroit*, 181 U. S. 396, 45 L. Ed. 914, 916, the court said:

> "We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States *the same protection against arbitrary State legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress*, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of Norwood v. Baker, French v. Asphalt Paving Co., 181 U. S. 324 ante, 879, 21 Sup. Ct. Rep. 625; Tonawanda v. Lyon, 181 U. S. 389, ante, 908, 21 Sup. Ct. Rep. 609; Wight v. Davidson, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616." (Italics ours.)

In *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. Ed. 908, 911, the court said:

> "The purpose of that amendment (14th) is to extend to the citizens and residents of the States the same protection against *arbitrary* State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress." (Italics ours.)

In the *Commodities Clause Cases,* 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. Rep. 527, the contention was made that the commodities clause of the Interstate Commerce Act was void because it created a discrimination by excepting the transportation of lumber and forest products from its operation. Without comment or argument upon the reason for the ruling, Chief Justice, then Mr. Justice White said:

> "Without elaborating, we hold the contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike."

Whether this ruling was based upon the proposition that there is no equal protection clause in the Fifth Amendment or upon the proposition that the exception referred to was the result of a reasonable distinction or discrimination is not expressly stated, but if the ruling had been pitched upon the first ground mentioned that answer would have been so simple, so conclusive and of such far-reaching scope that it seems reasonable to assume that it would have been expressly rested on that ground.

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, 36 Sup. Ct. Rep. 236, 244, the income tax law of 1913 was attacked. One of the objections made was that the law created a discrimination by reason of the progressive rates and the provisions for deductions. Chief Justice White, in delivering the opinion of the court, stated that as a general rule the due process clause of the Fifth Amendment is not a limitation upon the taxing power of Congress. He then continues:

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or *what is equivalent thereto,* was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

In *Wilson v. New,* 243 U. S. 332, 61 L. Ed. 755, 776, the court dealt with an act of Congress commonly known as the Adamson eight-hour law. The Chief Justice delivering the majority opinion stated that one of the contentions was that the act in effect denied the equal protection of the laws. If the "due process" clause of the Fifth Amendment did not contain within itself the essence of the equal protection clause of the Fourteenth Amendment, a statement to that effect would have been the easiest and most direct answer to this contention. However, that answer was not given, but the Chief Justice said:

> "The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. The second rests upon the charge that unlawful inequality results because the statute deals not with all but only with the wages of employes engaged in the movement of trains. But such employes were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification."

In no case have we been able to find any intimation by the court to the effect that the inhibition of the Fifth Amendment against the taking of property without due process of law is not broad enough to prevent an arbitrary classification, which if made by a State would be a violation of the declaration of the Fourteenth Amendment that no person shall be deprived of the equal protection of the laws. On the contrary, whenever this court has had occasion to discuss the subject, it has uniformly held that the purpose and effect of both amendments are in this respect the same. It seems obvious, therefore, that if the classification made by this act would have been invalid under the Fourteenth Amendment, had the act been that of a State legislature, the same conclusion must be reached because of the limitations imposed by the Fifth Amendment upon the powers of Congress. The act in question, so far as it requires payments of money to the Interstate Commerce Commission and into the reserve fund to be established and maintained by the carrier, applies only to carriers having net incomes in excess of a certain percentage upon

the value of their property, and the classification is, therefore, one based directly upon the profitableness of the business, without regard to the propriety of the charges made for each service rendered.

(E.) A classification of carriers, for rate-fixing purposes, solely upon the basis of the net earnings of such carriers for performing a similar service under like conditions in the same territory, is arbitrary and unequal, and therefore takes property without due process, in violation of the Fifth Amendment.

In *Cotting v. Godard,* 183 U. S. 79, 46 L. Ed. 92, Mr. Justice Brewer, who delivered the opinion of the court, discussed this very question in an exhaustive way. In that case, an act of the Kansas legislature was attacked, by which the rates of stockyards, having average daily receipts in excess of certain specified quantities of live stock, were regulated. There was no regulation of the rates and charges of stockyards having average daily receipts less than the quantity specified. The classification, in other words, was based directly upon the volume of the business. The opinion is, in part, as follows:

> "The express and only basis of classification is in the amount of business done between two classes. As evidence that we are right in our construction, we may refer to the brief of the learned attorney general, in which he says:
>
> "'* * * Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is

large, while in a smaller plant, doing a small volume of business, higher rates may be necessary in order to afford adequate returns.'

"If the average daily receipts of a stockyard are more than 100 head of cattle, or more than 300 head of hogs, or more than 300 head of sheep, it comes within the purview of this statute. If less than that amount, it is free from legislative restriction. No matter what yards it may touch today or in the near or far future, the express declaration of the statute is that stockyards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount

of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down."

A classification, not based upon the character or value of the services rendered, but simply on the amount of business done, had previously been discussed in the same opinion, where it was said:

"The State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. *He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.* Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. If any action to recover for an excessive charge, prior to all legislative action, who ever knew of any inquiry as to the

amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered? As said by Mr. Justice Bradley in Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. Ed. 584, 587, 2 Sup. Ct. Rep. 732:

" 'It is also obvious that, since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf, and are required to pay the regular charges therefor; provided, always, that the charges are reasonable, and not exorbitant.'

"In Canada Southern R. Co. v. International Bridge Co. (L. R. 8 App. Cas. 723, 731), Lord Chancellor Selborne thus expressed the decision of the House of Lords:

" 'It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and

the benefit to the person receiving that service, perfectly unexceptionable according to any standard of reasonableness which can be suggested. That being so, it seems to their lordships that it would be a very extraordinary thing, indeed, unless the legislature had expressly said so, to hold that the person using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their lordships can hardly characterize that argument as anything less than preposterous.'

"The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always, not, What does he make as the aggregate of his profits? but what is the value of the services which he renders to the one seeking and receiving such

services? Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but *it is only one factor,* and *is not that which finally determines the question of reasonableness.*" (Italics ours.)

The application of the principles so forcibly stated by Justice Brewer is apparent. The government did not undertake to guarantee a fixed income to any railroad beyond the readjustment period of six months. Congress directed that the Commission should divide the country into groups and should fix reasonable rates for each group that would produce five and one-half per cent. upon the reasonable value of the carrier property in the group, plus not exceeding one-half of one per cent. in its discretion, for betterments. The Commission was not limited as to groups and might have created as many as it thought necessary. Its action in establishing the groups defined in its opinion in Ex Parte 74 (*Increased Rates* 1920, 58 I. C. C., 220) is clearly an administrative discretion, which is not only not subject to review by the court but one to which this court will ascribe "the strength due to the judgment of a tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission,* 206 U. S., 441; 51 L. Ed. 1128; *Interstate Commerce Commission v. Union Pacific R. R. Co.,* 222 U. S. 54, 56 L. Ed. 308, 311.

Congress recognized that equal rates would not produce equal returns to every railroad in proportion to the amount invested. It did not undertake to equalize these rates as among the railroads, but provided that

the road with a net income in excess of six per cent of the value of its property should pay one-half of the excess to the Commission, and place and maintain the other half in a reserve fund. Of course, Congress was trying to provide for the average property, and the law is plain and clear and the direction to the Commission is the same as if the act had said that the rates should be so fixed by the Commission as that the average road in every group, by economy in management, etc., should earn six per cent, and that rates so fixed by the Commission should be held to be just and reasonable.

There is nothing in the law and nothing in the order of the Commission stating or implying any intention on the part of the government that there should be charged any unreasonable rate upon any class or commodity of traffic, or that any shipper should be required to pay more than a reasonable rate. To enforce the thought that the carriers might collect and retain nothing in excess of reasonable rates, paragraph (17) expressly declared that the provisions of Section 15a should not be construed to deprive shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates.

The rates collected and ultimately to be retained by this appellant, after it has paid all reparation orders that may be issued against it, being just and reasonable; being, in other words, fair charges for the services rendered in each case, we turn back again to find the following in the opinion of Justice Brewer in the *Stockyards Case, supra.*

"The question thus presented is of profoundest significance. It is true in this country that one

who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut out eyes to well known facts. Kansas is an agricultural State. Its extensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large, and makes one of the great industries of the State. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this, not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this court, when in Vanzant v. Waddell, 2 Yerg., 262, 270, he said:

"'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule,

and the mass of the community, who made the law, by another.' "

The learned justice then examined other decisions of this court and of the Supreme Court of Kansas, reinforcing his remarks, and added:

"The single matter for our present consideration is whether, in the restraint which the Legislature of Kansas has attempted to impose upon this stockyards company, it has trespassed upon those rights which by the Constitution of the United States are secured to every individual against State action. It has been more than once said judicially that one of the principles upon which this Government was founded is that of equality of rights. * * * There can be no pretense that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another which does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation

does not deny the equal protection of the laws we are unable to perceive what legislation would."

There can be no pretense that a railroad which earns seven per cent. is not doing precisely the same business as its competitor which earns only six per cent. The only difference is that one business is slightly more profitable than the other, but the receipt of the additional profits does not change the character of the business, and does not warrant any discrimination between the two properties or between their owners, and certainly cannot be held to warrant a requirement that the one shall pay over a part of its profits to the Government and shall place another part of its profits beyond the reach of the ordinary requirements of the business, while the other is left free to use its entire income as the managers of the business may see fit.

It has been suggested that the remarks of Justice Brewer, which have been quoted above, are mere *dicta*, and that six of the justices refused to concur in them. The statement of the six justices referred to was merely that they thought it unnecessary to express any opinion as to whether or not the statute in question deprived the company of its property without due process of law. Furthermore, these observations in the opinion of the court, from which we have quoted so largely, occupy such an important place in that opinion, and such great stress was laid upon them by the great judge who delivered the opinion, that if they had not been substantially approved by the six justices referred to it is entirely probable that a ringing dissent would have been delivered by those who thought that the due process question need not be determined.

The effect of this section, if valid, is that while two railroads lying side by side may haul equal quantities of the same commodity between the same points, at the same rate, yet if one be prosperous and well managed and earn more than six per cent. on the value of its property, and the other be so poorly operated that it earns only two per cent., the net result will be a taking by the Government of the property of one and the complete release of the other.

We have an act of Congress to consider, therefore, which constitutes a plain dassification according to the business done and the proft taken from it; which is applicable only to the business which is profitable beyond a specified extent, and which bears no relation whatever to the character of the business or to the value of the service performed; and which may be applied to one railroad earning seven per cent. and not to its competitor, which earns exactly six per cent.

Has it come to pass in this country which once, at least, was free, that industry, sagacity, prudence, foresight and efficient workmanship, with their rewards, have no protection under the fundamental law? Such would inevitably seem to be the case, if, without reference to the value of the service rendered, the Congress may single out the man whose railroad, built in the right place and well manned and operated, proves prosperous, and decree that merely because of the rate of return on his investment he alone must deliver a part of his profits to the government. If ever a court was confronted with a case of arbitrary classification, without reasonable basis, your Honors have it here.

(F.) The act deprives appellant of its property without due process by reason of the entire lack of provision for adjusting the actual earnings to the earnings as shown by the books shortly after the close of the annual accounting period.

The act assailed, when applied to the actual conditions of railroad operation and the system of reports and accounting required by law and by the Interstate Commerce Commission, is void and unenforcible.

It provides that if any carrier receives for any one year a net railway operating income in excess of a fair return upon its property, one-half of the excess shall be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund.

Under the accounting rules of the Commission every railroad is compelled to close its books within three months after the end of each calendar year, and the Interstate Commerce Act requires the annual report to be filed with the Commission within three months after the end of each calendar year. The demand made upon the appellant in this case (bill of complaint, Exhibit E, R. 34, 42) was to pay for the year 1920 one-half of $21,666.24, and for the year 1921 one-half of $33,766.99, or $10,833.12 for the first year, and $16,833.49 for the second year.

The accounting system does not permit unadjusted damage claims of any kind to enter into these figures, nor can the railroad company set them up as contingencies with any assurance of the sufficiency of the estimate and carry a reserve—known certainly to be sufficient—beyond the end of the year. It is even questionable whether it may be permitted to *speculate* as to what may

be recovered by shippers on account of overcharges or what shippers may require the railroad company to pay out upon claims for reparation on account of unreasonable rates.

The rules of the Commission (Exhibits A and B in the bill, R. 19, 22) require that the report of the year's operations shall be promptly made and the ascertained amount promptly paid. The report, of course, whenever made, must be based upon the books *as closed,* and the books must be closed for each year at a time which will permit the preparation of the annual report and the transmission thereof to the Commission within three months after the end of the year.

It may be conceded that the accounting rules of the Commission authorize the setting up of a reserve to provide for the payment of operating liabilities, which are not definitely determined during the accounting year as to liability and amount, or either. It will be observed, however, upon a consideration of these accounting regulations (R. 62-64) that any balance remaining in the operating reserve at the end of the year must be *analyzed* and a report made to the Commission showing "the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which balances the carrier shall preserve in its files *the details upon which such estimates were based.* * * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operating reserve account shall be *analyzed* as provided for in Section 20 of these instructions." (Italics ours.)

It must be borne in mind, however, that an operating reserve is a mere estimate. The estimate may readily be too low, and where the estimate is held down to details and is required to be supported by known facts, it probably will be too low. For instance, it is common knowledge that within statutory periods of limitation suits are frequently brought against railroad companies and other large concerns upon personal and death injury claims and others, particularly those sounding in tort, of which the accounting officers of the defendant were wholly unaware at the close of the accounting period during which the liability is claimed to have arisen. The mere authority, therefore, to establish a reserve, based upon an estimate, falls far short of authority to adjust the actual earnings to the book earnings, particularly when the estimate is hedged in by such limitations as those described in the rules copied above.

Assuming the correctness of the value upon which the returns of the appellant in this case were based, we have a demand at the end of 1920 for approximately $11,000.00, and at the end of 1921 for approximately $17,000.00. We have shown by Balderach's affidavit (complainant's exhibit No. 4, R. 49) that claims for reparation had been made by shippers on the ground that certain rates charged in 1920 and 1921 were excessive and unreasonable, the amount claimed against the appellant and its connections being over $57,000.00, but the exact proportion, if any, to be ultimately charged against appellant being unknown. That affidavit also shows claims for loss of and damage to freight, in which appellant is liable in whole or in part, of approximately $9,000.00, and other claims of less importance. Now, if these claims should be established in full, appellant

would be obliged to pay the claims in full out of its own property. But this law gives absolutely no enforcible claim against the Government for any refund; and if these claims in either year should equal the total amount of the so-called excess, the result would be that the railroad company had irretrievably paid to the Government one-half of the so-called excess, although it finally appeared that there was no excess in fact.

The best operated roads sometimes have very serious accidents. Suppose that in the latter days of December, 1920, some serious accident had occurred and settlements could not have been made (which would not have been unusual) before the books were closed for the year 1920, and suppose that in some subsequent year two judgments for $30,000.00 each should be obtained and affirmed on account of deaths or serious bodily injuries. The railroad company would be compelled to pay the judgments, and the result would be that instead of having a so-called excess earning for the year 1920, the net return would be less than six per cent., or perhaps even a deficit.

It is argued that these charges are "lap-overs" and would go into the accounts for the year in which paid. This is true, but it is equally true that the year in which they are paid might be absolutely devoid of excess earnings, wholly independent of the payment of these "lap-over" judgments.

Let us take a case actually existing. Reparation claims for excessive rates (and suits for personal injuries in the Texas Courts) may be filed at any time within two years after they accrue. [Revised Statutes of Texas, 1911, Art. 5687; Interstate Commerce Act, Sec. 16, par. (3).] Balderach's affidavit shows that the pending claim for alleged excessive charges of $57,000 ac-

crued during the two years under consideration, to wit, 1920 and 1921 (R. 49). The amount of it is still undetermined. It may be paid out in 1923, or even in 1925, and if the proportion of appellant should be great enough to absorb the entire so-called excess, the net result would be that we would have paid to the Government approximately $28,000 in so-called excessive earnings, and would in turn have paid to the shippers some amount, as yet undetermined, on account of excessive and unreasonable rates under which the so-called excess earnings accrued, yet appellant would have no claim for refund or reparation against the Government for the return of any part of the so-called excess earnings paid to the Commission.

The statement that the Government can take the private property of a railroad company under such terms, not only shocks the judicial conscience, but it staggers judicial credulity and must try judicial forbearance.

No more violent assumption can be made, based upon the history of railroads in this country, than that a high tide of prosperity such as occurred in 1917, for instance, would necessarily be followed by a like high tide of railroad prosperity in 1919. During that year the railroads were operated by the Government, and although the rates were increased over the entire country, the Government lost hundreds of millions of dollars from the operations. It *may be* that the complainant in this case will have a prosperous year in 1923 or 1924 or 1925; but it does too much violence to the judicial conscience to ask that the validity of a law be sustained upon such an *assumption.*

Another thing that must be observed is that the so-called "lap-overs" of a railroad company seldom repre-

sent amounts due the railroad company. The nature of its business and the present requirements of the statutes [Interstate Commerce Act, Sec. 3, par. (2), 41 Stat. 479; Ex parte 73, 57 I. C. C. 591] compel it to collect all collectible revenue as the business progresses, so that at the end of the year amounts owing to it (except interline traffic balances, which normally somewhat balance each other) are practically all collected, while claims against railroads sometimes remain unadjusted, and sometimes undiscovered, for many years; and what lean year the adjustment of large claims may fall in can no more be forecasted than the amount of the final adjustment thereof can be determined in advance.

It is not impossible that a small road, with small earnings, like appellant, might in some year have so-called excess earnings, and after it had paid the Government its one-half thereof, not only the whole of the excess earnings, but all other earnings as well, might be wiped out by reparation claims of shippers on the ground that some specific rate, under which the earnings accrued, was excessive. The *quantum* of the taking, however, does not seem to be important. If the Government takes the widow's mite without compensation, the Constitution is just as clearly violated as it would have been if it had been permitted to take the Arlington Estate in the Lee case, or as if it should be permitted to take the millions of the rich.

The declaration of Mr. Justice Harlan, speaking for the court in *Sweet v. Rechel,* 159 U. S. 380, 40 L. Ed. 188, seems to be peculiarly apt:

> "Much stress was placed by counsel in that case (Connecticut River R. R. Co. v. Franklin County Commissioners, 127 Mass. 50, 34 Amr. Rep. 338)

upon the admitted fact that the earnings of the railroad owned by the Commonwealth would *probably* be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, *without being subjected to undue risk or unreasonable delay.*

"Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. In Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 658, the court said: 'The Constitution declares that private property shall not be taken for public use without just compensation. It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. *But the owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed.* • • •

"• • • The legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes *the absolute right of the owner,* upon his property being taken, to just and reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, *without unreasonable delay or risk to the owner,* of the compensation to which, under the Constitution, he is entitled and to a judgment in his favor, *enforceable* against such corporation *in some effective mode,* so that the owner can certainly obtain the amount of such compensation." (Italics ours.)

Substantially the same rule was laid down in the later case of *Chicago, Milwaukee & St. Paul R. Co. v. Wisconsin,* 238 U. S. 491, 59 L. Ed. 1423, 1430, in which this

court replied to the suggestion of the State Court that, if compliance with the statutory command to leave upper berths closed, unless sold, imposes additional operating costs in the conduct of the business "the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court said:

> "But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed." (Emphasis by the court.)

In the instant case appellant is subjected to the risk of uncertainty in two respects:

We are first told that we may estimate these unadjusted claims provided our estimate be subject to analysis and be supported by details, and, if we fail to estimate the expenses sufficiently high, or if we have no knowledge of damages for which we may be liable, but for which no claims have been made and no suits have been filed, as is frequently the case, that is our misfortune.

In the second place, we are told that in whatever year these liabilities are definitely determined and payment thereof is made, the amounts so found to be due may be taken out of what would otherwise be excess income, and thus the loss will not fall on the appellant. This assumption entirely overlooks the most potential factor in the equation, which is that there may not be for that year, nor for any subsequent year, any excess earnings against which to charge these losses when they occur.

Reparation claims are most frequently long drawn-out and are not determined for many years in many cases, but the Congress did not intend that there should be any mistake about the right of the shipper to enforce his claim for reparation, and therefore paragraph 17 of Section 15-a expressly provides that the provisions of the section "shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates."

By failing to provide any means whereby the carrier could have or enforce any reciprocal claim against the Government, Congress made it equally plain that the carrier should have no "reparation" against the Government in cases where "excess earnings" according to the books were paid over and subsequent developments proved that the books did not reflect the facts.

In other words, the declaration of Congress in paragraph 17 is irreconcilable with that contained in paragraph 6. Paragraph 6 commands that the so-called excess shall be paid to the Government. Paragraph 17 says that if the so-called excess earnings accrued by reason of excessive rates or discriminatory rates, the shipper shall be entitled to all of such excess, notwithstanding the fact that the Government has already received one-half of it. The only limitation in the declaration of paragraph 17 is that a shipper shall not be entitled to recover "upon the SOLE ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

It is somewhat difficult to determine exactly what Congress meant by the sentence above quoted. It seems to

contain two declarations: first, that no particular rate shall be deemed excessive so that a shipper may recover a proportion thereof upon the sole ground that the system of rates produced an excess; and, second, that whatever ground the shipper may recover reparation upon, it is not to come out of the so-called excess paid by the carrier to the Commission. In other words, the Congress undertook forever and conclusively to prohibit the railroad company from having any claim of any character upon the Government on the ground that it had paid excess earnings to the Government and then refunded, in the nature of reparation to the shipper, a part of the earnings which contained the assumed excess thus exacted, reported and paid.

The statute is not only in palpable violation of the Constitution, but it is so manifestly unfair and unjust that no court should feel obliged to enforce it until the constitutional bulwarks against the unlawful and arbitrary taking of private property shall be entirely and concededly demolished and obliterated.

IV.

The statute is unconstitutional as to appellant and therefore the orders entered in pursuance thereof the void as a violation of the Tenth Amendment to the Constitution of the United States because the recapture provision applies to the net income which is derived from the conduct of intrastate as well as interstate and foreign business and operates as a limitation upon the earning power of a Texas corporation with respect to its business done wholly within that State. The proper regulation of interstate and foreign commerce by Congress and its agencies has no such real or substantial

relation to high or excessive earnings on purely State business as will justify any limitation upon them by the Federal Government.

In this connection the petition reads in part as follows:

"(d) Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued solely for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from complainant the earnings, or any part of the earnings, accruing to complainant from purely intrastate commerce; that to do so would be in violation of the Tenth Amendment of the Constitution of the United States, and any law seeking so to do would be wholly void; that the defendant herein and the Commission cannot complain, nor can they, or either of them, nor can interstate and foreign commerce and persons engaged therein, nor either or any of them, be in any manner injuriously affected or in the slightest way prejudiced by large earnings on the part of complainant accruing to it from intrastate commerce.

"That if the receipts and income of complainant from the handling and movement of intrastate traffic be unduly low, or amount to less than a fair return upon the value of the property devoted to that public service, manifestly the Congress and the Commission are prohibited by the Fifth and Tenth Amendments to the Constitution of the United States from further reducing those receipts by requiring a part thereof to be paid to the Commission and placed in the reserve fund contemplated by said Section 15-a. And, on the other hand, if the receipts and income of complainant resulting or accruing from the handling and movement of intrastate traffic are reasonably or sufficiently or even unduly

high, then, and in every such case, such receipts and income have and bear no such relationship to interstate or foreign commerce as will justify or create occasion for any interference with or regulation of or capture or recapture of the same, or any part thereof, by the Congress or the Commission under the power to regulate commerce with foreign nations and among the several States.

"That, as the State is forbidden to complain of earnings in interstate commerce, or to place burdens thereon, or to take the receipts and avails therefrom, so also the law is that the fact that a carrier is engaged in both state and interstate commerce does not authorize, permit, or justify the Congress or the Commission in complaining of or taking or reducing excess earnings arising from the conduct of intrastate commerce, nor authorize the imposition by Congress of unjust and unreasonable burdens upon intrastate commerce, nor authorize nor permit the Congress or the Commission or the United States to take from the complainant the earnings, or any part thereof, which accrued to complainant on account of earnings by it in purely intrastate commerce. Neither the law nor the Commission has made or attempted to make any rule, regulation, or provision by which excessive earnings, if any, in intrastate commerce may be separated or segregated from the earnings of the carrier in interstate and foreign commerce, and no such effort at separation has been made; and the Commission has demanded that complainant shall pay to it not only all the so-called excess earnings earned by complainant in interstate and foreign commerce, over which Congress has the power of control and regulation, but has also demanded that complainant shall pay to the Commission all of its so-called excess earnings, including those accruing to complainant for its services in purely intrastate commerce, the right to control which is expressly reserved, by the Tenth Amendment to the Constitution of the United States, to the State of Texas and to the people of the State, and

is not subject to the control, regulation, or dominion of the Congress of the United States nor of the Commission." (R. 13-14.)

The affidavit of J. J. Balderach (complainant's exhibit No. 4, R. 51-52) reads in part as follows:

"The gross freight revenue of said company, derived from interstate and foreign business during the period commencing March 1, 1920, and ending December 31, 1920, was $119,597.83; that the intrastate freight revenues of said company for the same period were $178,289.32, as shown by the statements attached hereto marked Exhibit 'A' and Exhibit 'B,' respectively.

"That the interstate and foreign freight revenues of said company for the calendar year 1921 were $109,190.30, and the intrastate freight revenue of said company during the same year was $238,861.50, as shown by the statements hereto attached, marked Exhibits 'C' and 'D,' respectively. That the passenger revenue of said company for said respective periods was as follows:

"Last Ten Months of 1920 ..... $ 8,582.94
"Calendar Year 1921 ..... 10,213.64

"That all of said passenger revenue was derived from the conduct of purely intrastate business within the State of Texas, said company having had during the period involved in this suit no arrangement whatever for through travel or through tickets with any other line of railroad, and every passenger upon the trains of said company being required to pay local fare or purchase local tickets over its line. That, therefore, the freight and passenger revenue of said company for the last ten months of 1920 and the calendar year 1921, intrastate, as compared with interstate and foreign, was as follows:

	Intrastate	*Interstate*
Last Ten Months 1920	$186,872.26	$119,597.83
Year 1921	249,075.14	109,190.30
"Total	$435,947.40	$228,788.13

> "From the foregoing it will appear that the receipts of the Dayton-Goose Creek Railway Company from the conduct of purely intrastate business, freight and passenger, was, for the last ten months of 1920, 60.97% of the total receipts from intrastate, interstate and foreign traffic, and was, for the year 1921, 69.52% of the same; and considering said two periods as a whole, the intrastate receipts amounted to 65.58% of the total receipts for the period commencing March 1, 1920, and ending December 31, 1921."

It is fundamental that Federal legislation, to be sustained under the commerce clause, must have an adequate connection with the proper conduct, or the protection, or the development, of interstate or foreign commerce. This rule has been many times announced by this court.

In *Adair v. United States,* 208 U. S. 161, 52 L. Ed. 436, 444, the court said:

> "Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In *Mondou v. N. Y. N. H. & H.,* 223 U. S., 1, 56 L. Ed. 327, 345, the court reaffirmed that rule and, speaking of the Congressional power over interstate commerce, said:

> "But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

In the *Shreveport Case, H. E. & W. T. v. United*

States, 234 U. S. 342, 58 L. Ed., 1341, 1348, substantially the same statement was made. And the court said that the authority of Congress

> "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

This is no novel doctrine in this court. The substance of it was expressed by Judge Harlan as far back as *Mugler v. Kansas,* 123 U. S. 623, 31 L. Ed., 205, in which the court, speaking through him, said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

There is in this respect no difference, of course, so far as the validity of an act is concerned, whether it be passed under the guise of an exercise of the police power or the commerce power. No one would have the te-

merity to say that a Federal act regulating the issuance of attachments in the State courts of Texas was valid simply because the Congress in enacting it had *recited* that such an act appeared to be necessary in order to promote the conduct of interstate commerce, and if it appears upon analysis that there is no reasonable connection between the proper conduct of interstate and foreign commerce and a relatively high system of State rates, it will follow that the earnings under those rates may not be limited by the Federal Congress nor reduced or recaptured.

Substantially the same statement was made in the *Wisconsin Rate Case,* 257 U. S. 563, 66 L. Ed. 371, 42 Sup. Ct. Rep., 232, in which the court said:

> "Action of the Interstate Commerce Commission in this regard should be directed to *substantial disparity* which operates as a *real discrimination* against, and obstruction to interstate commerce, and must leave appropriate discretion to the State authorities to deal with the intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics ours.)

In *Nathan v. Louisiana,* 8 How. 73, 12 L. Ed., 992, the court said:

> "Now the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government."

In *G. H. & S. A. v. Texas,* 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. Rep., 638, the court struck down, as a burden upon interstate commerce, an act of the Texas Legislature levying a tax calculated upon the gross re-

ceipts of a carrier engaged in interstate and intrastate commerce. The doctrine of that case is equally applicable here. Congress has no more right to take a part of the intrastate receipts of a carrier than the State has to take a part of interstate receipts.

The *Shreveport Case, supra,* and the *Wisconsin Rate Case* did not involve at all the situation which we have here. In each of those cases the court had to deal with a system of State rates which was unduly low. It was pointed out, particularly in the *Shreveport Case,* that an unduly low system of State rates constituted a direct impediment to the proper conduct of interstate and foreign commerce in several ways. First, a system of State rates which did not afford a fair return for the service rendered under those rates would necessarily result either in the insolvency of the carriers, which were the instrumentalities of interstate commerce as well as of the internal commerce of the State, or in burdening interstate commerce with more than its fair share of the cost of transportation in order to prevent the bankruptcy of those carriers. Therefore, the general public shipping in interstate commerce were directly and injuriously affected, either by having to pay for their service more than it should rightfully cost or by having a poorer service than they should be given on account of the inadequate financial resources of the carriers engaged in both classes of business.

Second, an unduly low system of State rates constituted an unreasonable discrimination against persons and localities engaged in interstate commerce to the advantage of those competing with them by shipping wholly within a single State. It was pointed out for

example that a jobber in Dallas or Houston could ship his goods, intrastate, to points in Texas in the direction of Shreveport for a smaller charge per mile than the jobber at Shreveport could ship the same kind of goods under identical conditions in the direction of Dallas or Houston. Substantially the same kind of discrimination was found to exist in the *Wisconsin Case* by virtue of the interstate passenger fares having been fixed at 3.6 cents per mile while the intrastate fares remained at 2 cents per mile.

The Congress has undoubtedly the right to protect interstate commerce and those engaging in it, to foster, to develop it and to prevent the imposition of burdens upon it. In those cases where the general level of State rates is such as to interfere directly or indirectly with the conduct of interstate commerce, the court has plainly and rightfully said that:

> "Congress as the dominant controller of interstate commerce may, therefore, restrain undue *limitation* of the earning power of the interstate commerce system in doing State work." (*Wisconsin Rate Case.*)

But it may not be assumed in this case that the State rates are too low. Such an assumption would be suicidal for those who attempt to sustain the validity of this act, because they would straightway be met with the proposition that if the State rates are already too low any further reduction of them by recapture or any other process would plainly be confiscatory and in violation of the Fifth Amendment. In order to avoid that immediate source of destruction the assumption must

be, either that the State rates are amply high, or that they are at least, in some degree, excessive.

But, if the State rates are sufficiently high, or if they be excessive, the connection between the earnings under State rates and the proper conduct of interstate commerce, which exists in the case of a low system of State rates, immediately and entirely disappears. Instead of any tendency toward the bankruptcy of interstate carriers and their consequently diminished ability to perform their interstate functions, the tendency is, of course, toward affluence and an increased ability to serve that part of the public shipping and traveling in interstate commerce. Instead of giving the public shipping or traveling in interstate commerce the altenative of paying excessive rates or submitting to a deteriorated service, under a high system of state rates they may have a better service for an equal or a proportionately smaller charge. Instead of the jobber in Shreveport moving his groceries 100 miles for a fixed sum, as against the movement of the goods of his Houston competitor 125 miles for the same sum, the discrimination is either removed, if the State and interstate rates are on the same level, or, if the State rates are fixed too high, such discrimination as may remain prefers the interstate shipper instead of operating to his disadvantage.

Of what rightful concern is it to the Federal Congress that a Texas corporation earns a large return upon its investment by the conduct of a business wholly within the limits of that State? In what way can that return have injurious effect upon the efficiency of an interstate railroad system? What burden can thus be placed upon

that system or upon the shippers who resort to it for service in the conduct of their interstate affairs? Is it not plain that, to paraphrase the language of the Chief Justice in the *Wisconsin Rate Case*, the effect of the act is merely to place a limit upon the earning power of a railroad doing a purely intrastate work? If there is any power in this government by which such limitations may be imposed, it obviously rests in the people of the State of Texas or their legislature, and not in the Federal Congress or in its Commission.

It is said on behalf of the Commission that a contention similar to the one here made by appellant was made by counsel for the State Commissions in the *Wisconsin Rate Case*. That statement is not borne out by the opinion in that case. The decision of that case was pitched entirely upon the proposition that the State fares discriminated against and placed a burden upon interstate passengers and interstate commerce and that Congress had a right to remove this discrimination and to relieve interstate commerce of this burden. Here, the assumption must be, as has already been pointed out, that the State rates are ample or too high, and it follows that there is no possible discrimination against interstate commerce and no burden upon it.

It is also said that the effect of this act upon the receipts from intrastate commerce can be justified upon the theory that we have here a novel system or method of fixing rates. The theory is that rates may be fixed "prophetically" by an order which establishes them absolutely in advance in the hope that the aggregate net income produced by the entire system of rates so fixed will amount to a fair return upon the value of the prop-

erty employed in the public service. Or, the regulatory body "may permit rates which are relatively just and free from discrimination but which, so far as the carrier is concerned, are tentative and subject to the test of actual results." It is said that rates may be fixed which are relatively too high upon condition that, at stated intervals, the carrier will yield up to the government the excess above what is just and reasonable, that excess to be determined by the carrier's operating results or income account. There are several answers to this argument. It assumes, in the first place, that Section 15a of the Interstate Commerce Act fixes, in the manner described, the intrastate rates of carriers. That this assumption is erroneous there can be no question. In the *Wisconsin Rate Case* the court said:

> "*Section 15a confers no power on the Commission to deal with intrastate rates.* * * * It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. *It does not involve* general regulation of intrastate commerce." (Italics ours.)

Even if the court had not in that case given such a decisive negative to the assumption, it is submitted that, with one possible exception, the Congress in the system of rate regulation provided in the Interstate Commerce Act, as amended by the Transportation Act, has reached the extreme limit of its constitutional power in dealing with intrastate rates. It has undoubtedly been claimed at times that the Congress might, under the commerce clause, authorize the Commission to fix all rates, State and interstate, for railroads engaged in interstate com-

merce, just as it has made the Safety Appliance Act applicable to all vehicles moving over such a railroad irrespective of the character of commerce contained in any particular car. The Supreme Court, however, has not gone to that extent. In the case of *State of Texas v. Eastern Texas Railroad Company,* 258 U. S. 204, 66 L. Ed. 566, 572, 42 Sup. Ct. Rep., 281, the court pointedly refused to construe the abandonment provisions of the act to apply to the absolute and complete abandonment of a railroad lying wholly in Texas. The road, up to the time of the issuance of the Commission's certificate, had been engaged in interstate commerce. The court said:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.
>
> "If paragraphs 18, 19 and 20, be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, *a serious question of their constitutional validity will be unavoidable.* If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the

other of which such questions are avoided, our duty is to adopt the latter.' "

"Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that *what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental* to the effective regulation and protection of commerce of the other class. They contain manifestations of *a continuing purpose to refrain from any regulation of intrastate commerce,* save such as is involved in *the rightful exertion of the power of Congress over interstate and foreign commerce.* * * *

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business." (Italics ours.)

If the Congress should vest the Interstate Commerce Commission, through a power of suspension, similar to that which the Commission now exercises with respect to interstate rates, with the right to prevent, in advance, the same kinds of discrimination against interstate commerce which the Commission now has the power as evidenced by the *Shreveport* and *Wisconsin Cases,*

to remove after they become effective, it will be plain that no further interference with the State rates by the Congress or the Commission can be justified under the Constitution. That is the only gap now left in the fence. With respect to the prevention of such discriminations the Commission is now as helpless as a common law court without the equity power of issuing injunctions, but if this additional power should be given to the Commission there will not only be no further necessity for any interference with State rates by the Federal Government, but no justification for such interference can be found. So far as State rates are concerned the remedy will not only be plain and adequate for the protection and development of interstate commerce, but it will be speedy and efficacious in the highest degree.

Consequently, the recapture provisions of Section 15a can not be justified upon the theory that it initiates a conditional system of fixing rates, because that theory leads us directly back to the original objection that such power as Congress has over intrastate rates is purely incidental to its paramount power over interstate commerce and that Congress may not, as stated in the *Minnesota Rate Cases,* and quoted again with approval in the *Wisconsin Case,* "deal with the internal concerns of the State as such." (*Minnesota Rate Cases,* 230 U. S. 352, 57 L. Ed. 1511, 399.)

There are other objections to this theory of fixing rates conditionally which are dealt with elsewhere in this brief. For instance, assume two railroads paralleling each other between the same points and operating under substantially the same conditions. Both are hon-

estly, efficiently and economically managed but one manager is somewhat better than the other. Assume that one of these roads at the end of the year earns exactly six per cent upon the value of its property and that the other earns seven per cent. If this act is valid then the better operated road ultimately retains smaller rates than the other. Would not rates so fixed result in such a discrimination and lack of uniformity as to amount to a taking of property without due process of law in violation of the Fifth Amendment; "or, what is equivalent thereto, be so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (*Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 36 Sup. Ct. Rep. Ct. Rep. 236, 244, 60 L. Ed. 493.)

The argument is also made that if a carrier can not complain of a system of rates under which it earns a a fair return, for example, six per cent., it has no just complaint if the rates are fixed so as to produce more than that amount with a condition that the excess shall be repaid to the government, and it is said:

> "If it could not have objected under the old law to rates yielding it $10,000,000, it can not complain if the new law leaves it $10,000,000, but reaches that result by permitting it tentatively to collect more and recapture part." (Bunn Recapture of Earnings Provisions of Transportation Act, Yale Law Journal, Vol. 32, No. 3, p. 223.)

It is true that if a general level of rates were fixed for all carriers which produced a fair return on the part of some, those carriers which earned a fair return would have no complaint; but the statement quoted

above overlooks entirely the proposition that while there may be no complaint of a direct taking of property there may yet be a perfectly valid complaint on account of a discrimination so gross as to produce the same result, as indicated by Chief Justice White in the case of *Brushaber v. Union Pacific Railroad Co., supra.* There can be no distinction in principle between an act of the Federal Congress placing a direct limitation upon the earning power of a Texas corporation on business done wholly within that State and a Congressional Act which undertakes to limit the hours during which children may work in mills or factories.

The decisions of this court in *Green v. Louisville & I R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, and in *Sioux City Bridge Co v. Dakota County*, 43 Sup. Ct. Rep. 190, 67 L. Ed. Adv. Ops. 220, present the rule properly applicable. Those were both cases in which complaint was made of a discrimination in taxation, not by reason of an over-valuation of the property of the complainants, but by reason of a systematic under-valuation of the property of others. In the more recent case, the Chief Justice, speaking for the court said:

> "The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of Taylor v. Louisville & N. R. Co., 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in Greene v. Louisville & Interurban R. Co., 224 U. S. 499, 516, 517, 518, 37 Sup. Ct. 673, 61 L. Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured tax payer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment

> of the great mass of under-assessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that *where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.*"

The questions, if not arising on the same facts, are identical in principle. Ordinarily, no man can complain if his property is assessed at full value, and ordinarily no public utility can complain if its rates afford at least a fair return upon the value of the property which it employs in the public service, but if one property owner, as has been held by this court, has a right to have his assessment at full value enjoined because the property of others is assessed at less than full value, it would seem to follow necessarily that a public utility is likewise discriminated against if its competitor is allowed special privileges and immunities, of which it is sought to be deprived, notwithstanding the fact that the complainant could not prove a case of confiscation. In other words, discrimination may exist in the absence of confiscation and the one is as thoroughly forbidden as the other; in fact, both are forbidden by the same amendment to the Constitution.

In *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, the court passed upon the validity of such a child labor law, disguised as a regulation of interstate commerce, and struck it down, saying:

> "*The act in its effect does not regulate transportation among the States,* but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production over, the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power." (Italics ours.)

Neither does *this* act "regulate transportation among the States," insofar as it seeks to condemn the earnings from intrastate commerce.

The argument of necessity and convenience which has been so urged in this case as a justification for the recapture provisions of Section 15a was so strongly urged upon the Congress that notwithstanding the decision in *Hammer v. Dagenhart,* it again undertook to regulate child labor within the States under the guise of an exercise of the taxing power, by imosing a special tax upon employers who violated the standards set by Congress. The validity of that act came before the court in *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. Rep. 449, 451. The opinion, delivered by Chief Justice Taft, is in part as follows:

> "The case before us cannot be distinguished from that of Hammer v. Dagenhart, 247 U. S., 251, 62 L. Ed., 1101, 3 A. L. R., 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for

the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

" 'In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States,—a purely State authority.' "

"In the case at the bar, Congress, *in the name of a tax* which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

"The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State, in order to coerce them into compliance with Congress' regulation of State concerns, the court said *this was not in fact regulation of interstate commerce,* but rather that of State concerns, and was invalid. So here the so-called tax is a penalty to coerce the people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State Government under the Federal Constitution. This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat, 316, 423, 4 L. Ed. 579, 605, in a much quoted passage:

" 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this trib-

unal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' " (Italics ours.)

Noble State Bank v. Haskell, 219 U. S. 104, 575, 55 L. Ed. 112, 341, 31 Sup. Ct. Rep. 186, 299, was presented in argument below and will doubtless be relied upon in this court to sustain the statute under consideration. In that case the court upheld the validity of the statute of Oklahoma establishing a fund for the security of deposits in State banks organized under the State law. That this decision can not successfully be relied upon to sustain the statute involved in the case at bar would seem to be obvious. The first opinion in that case is the more readily understood when taken in connection with the opinion written on motion for leave to file a petition for rehearing.

The banks to which that law applied were chartered by the State which enacted the law and those charters were expressly subject to alteration, amendment, or repeal. There can be no question but that the State of Oklahoma, as an original proposition, might with entire propriety have enacted a law for the incorporation of State banks under which banks so chartered would, as a condition of incorporation, and of the transaction of the banking business within the State, have been obliged to contribute to such a fund as was created by that statute. Having the right to authorize a charter upon those terms and having the express right to alter and amend charters already granted there can be no doubt about the power of the State on this ground to say, in substance, to the Noble State Bank: "Here are some new conditions which are appended to your char-

ter. You may have your election—you may either accept and operate under the charter as amended or you may dissolve and liquidate and go out of business." The decision of the case in the Supreme Court might have been pitched solely upon this ground with entire propriety. That the force of this argument was not overlooked by that court is apparent from the opening pagagraphs of the opinion. But the court instead of depending entirely upon this proposition decided the case also upon the ground that the exertion of power involved was an appropriate exercise of the police power.

The distinction between the Haskell case and this one is simple and clear. There is a marked difference between the rights of persons affected by an exercise of the power to regulate commerce and the rights of persons affected by an exercise of the police power of a State. The decision of the Haskell case was partly based upon the proposition that the law involved was a valid exercise of the police power. Under that power it has been repeatedly held that the use of property may be prohibited and its value practically or entirely destroyed without compensation. *Mugler v. Kansas,* 123 U. S. 623, 31 L. Ed. 205; *Bowditch v. Boston,* 101 U. S. 16, 25 L. Ed. 980; *Fertilizer Co. v. Hyde Park,* 97 U. S. 659, 24 L. Ed. 1036; *California Reduction Co. v. Sanitary Reduction Works,* 199 U. S. 306, 50 L. Ed. 204. On the other hand "in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use." *Scranton v. Wheeler,* 179 U. S. 141, 45 L. Ed. 126. "The power

to regulate commerce is not given in any broader terms than that to establish postoffices and postroads, but if Congress wishes to take private property upon which to build a postoffice it must either agree upon the price with the owner, or, in condemnation, pay just compensation therefor." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463. Insofar as the decision in the Haskell case was not grounded upon the police power, it was based on the fact that the law amounted to a proper amendment of the charter of the bank under a power of amendment expressly reserved at the time the charter was granted.

The situation here is different. This appellant was not chartered by the United States Government. It has no election to discontinue business. It may not cease the transaction of its interstate commerce business without the express consent of the Interstate Commerce Commission (*State of Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 42 Sup. Ct. Rep., 281.) It may not cease to conduct the business of intrastate commerce without the express consent of the Legislature of Texas. It must stay in business and perform its functions as a common carrier and discharge its public duties and has no choice to accept the law or to reject it and go out of business as the bank had in the case referred to.

It is elementary, of course, that the Federal Government has no general police power. Such powers as it has are those which have been expressly granted and those which may be implied from them. It has no general mandate to conserve the general welfare. Such police regulations as have been enacted by the Congress and sustained by the courts have been enacted and sus-

tained as appropriate exertions of the powers, either expressly or impliedly granted by the Federal Constitution. For instance, in *Caminetti v. United States,* 242 U. S. 470, 37 Sup. Ct. Rep., 192, 61 L. Ed. 442, the court sustained the Mann Act upon the ground that it was a proper exercise of the power to regulate commerce. Therefore, if the law here in question can not be sustained as a regulation of interstate commerce, either because it constitutes an invasion of the reserved powers of the State or because it is violative of the Fifth Amendment or for any other reason it is futile to talk about the police power. The Oklahoma Bank Case is, therefore, not analogous and will ultimately give neither aid nor comfort to those who strive to sustain the validity of the law here attacked.

The net result of a consideration of that case is merely to bring us back to the original inquiry, whether the act in question is really an exertion of the power of Congress over interstate commerce; or whether, *under the guise* of an exercise of that power, it is not really a definite, a palpable and an unwarranted intrusion into the internal affairs of the State and therefore a plain violation of the Tenth Amendment.

If the appellant in this case earns a large return upon the traffic which it moves within the State of Texas, that income, no matter how large it may be, is no more within the province of Congress to limit or to regulate than was the subject of the hours of child labor in the cotton mills and furniture factories of North Carolina.

Keller v. United States, 213 U. S., 138, 53 L. Ed., 737, involved the validity of the Act of Congress of Febru-

ary 20, 1907, which prohibited the transportation of any alien woman or girl for the purpose of prostitution; penalized the importation of women and girls for that purpose and also penalized the keeping, maintaining or harboring of any such girl or woman for any such purpose within three years after entry. The defendant in that case, having been convicted of keeping and harboring, attacked the power of Congress to legislate with respect to a matter which was claimed to be solely subject to the police power of the State. Justice Brewer, speaking for the court and sustaining the attack upon the statute, said:

> "While the acts of Congress are to be liberally construed in order to enable it to carry into effect the power conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.
>
> "We should never forget the declaration in Texas v. White, 7 Wallace, 700, 725, that 'the Constitution in all its provisions looks to an indestructible union composed of indestructible States.'"

In *G. H. & S. A. v. Texas, supra,* speaking of the duty of the court with reference to burdens laid upon interstate commerce by State Legislatures, the court said:

> "Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to regulation in a relatively immediate way, it will not be saved by name or form."

The duty of this Court with respect to an Act of Congress invading the powers reserved to the States and

their people by the Tenth Amendment to the Constitution is precisely the same as that which exists when it comes to consider an act by which a State invades a field committed to Congress. Therefore, this court may well say that neither the Congress nor the Commission, by giving this imposition a particular name or by the use of some form of words, can take away its duty to consider its nature and effect; that if it has no proper relation to, or connection with interstate commerce, if it could not burden or interfere with or impede the efficient and economical conduct of interstate commerce, and if it bears upon the internal commerce of the State so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.

No matter what the purpose may have been, no matter how good may have been the intentions of the legislators, no matter how much they may have imagined they could constructively accomplish, when all is said and done they have enacted a law under which, for fear that some carrier might make more money than they would like to see it make, they have provided that a part of its earnings derived from purely intrastate commerce within the State of Texas should be paid over to the Federal Government, which, so far as the records show, had not contributed anything to the size of those earnings, and had no title to them and no conveyance from the parties who had originally paid the charges in which the assumed excess was supposed to exist.

V.

Section 15a of the Interstate Commerce Act does not levy or impose a tax and is not an exercise of the taxing power of Congress.

The court below, in its opinion, said:

"While the exaction in question is not denominated a tax, it is in effect an excise tax levied on all the carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent. on their invested capital, and all are exempt up to this percentage of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. * * *

"The tax would be an excise tax on the business of the class of carriers named. * ** *

"So regarded, the requirement that this fund be held in trust for, and be paid to the United States, is, as to the percentage of sums collected in excess of the percentage to be retained by the railway company, not the taking of its property without compensation or due process of law." (R. 67-68, 287 Fed. 732).

Laying aside for the moment the discussion of the proper construction of the Act, we note that this part of the opinion of the court below is subject to two vices:

(a) Even if the act be construed as levying a tax, as to that part of the carrier's income required to be paid to the Commission, that construction affords no escape from the proposition that the limitations and restrictions placed by the act upon the use or disposition of that portion of its so-called excess earnings which the carrier is permitted to retain, plainly result in a deprivation of property and liberty without due process. The court was apparently driven to the conclusion that the act could not be sustained except by adopting the tax theory and that the tax theory would dispose of the whole matter and of all objections urged

against the act. But the moneys to be placed in the reserve fund, which the carrier is required to establish and maintain, are certainly not the proceeds of a tax; they are not claimed by the government; they are conceded to be the property of the carrier. Yet, the government assumes to say to the carrier that it may not use that part of its property except for certain limited and specified purposes, and then only upon certain conditions which may or may not arise. This objection to the act will be more fully developed in another portion of this brief, but it has seemed proper to draw attention, at this point, to the fact that the tax theory can not save the act from the constitutional objections urged against it.

It can save if anything, only one-half of the question at issue, and that is the fifty per cent. of so-called excess earnings to be paid to the government. The remaining fifty per cent. stands out untouched and undisposed of by the tax theory, and wholly orphaned by the court cries aloud for the protection of the constitution and in condemnation of the tax theory of the lower court.

(b) The opinion then proceeds with the statement that:

> "This part of the income of the road," namely, the part required to be paid to the Commission, "is not collected by it absolutely as its property," but "in trust for and to be paid to the United States."

This statement is utterly incompatible with the idea of a tax and is itself sufficient to refute the theory upon which the act was sustained by the court below. The essence of a tax is that it involves an involuntary *transfer*

of title from the subject to the government, in order that the property transferred (usually money) may be devoted to governmental purposes. A tax measure is one by which the government *acquires* something which it did not have before. If no additional funds or property be acquired no revenue is raised and no tax can be said to have been levied. While it may be entirely proper for Congress to provide in a revenue law for a transfer of government funds from one depositary or officer to another, nevertheless a law providing solely for a transfer of funds already belonging to the government is certainly not a tax law. The government does not tax itself, and no tax is levied unless the effect of the levy is to require the subject to deliver to the government something which had previously been the property not of the government but of the tax payer. If, therefore, this part of the carrier's income had never been earned by it as its own absolute property, and if, when earned, it was the property of the government, the requirement that it be paid to some other officer or department of the government can not constitute the levy of a tax. If it became the property of complainant it may not be taken except in accord with the provisions of the Fifth Amendment, and the act makes no provision for such accord.

We recur then to the question whether Section 15a of the Interstate Commerce Act, properly construed, can be held to levy an excise or other form of tax. In considering this question it must be borne in mind that this act was framed and passed in the early part of 1920. During the five years next preceding the passage of this act the Congress of the United States had had more

experience in framing revenue measures than ever before in any similar period of time, and, therefore, the presumption that Congress was acquainted with the technical expressions customarily used in the levy of taxes, has, in this instance, more than ordinary weight. No words, however, appropriate to the levy of a tax are found in the Section of the act under consideration. In framing the original excise tax imposed upon corporations (Act of August 5th, 1909, 36 Stat. 11, 112), Congress declared:

> "That every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation. * * * " (Sec. 38.)

In the preceding Section the tax on foreign built pleasure vessels was assessed by the use of the words:

> "There shall be levied and collected annually * * * upon the use of every foreign built yacht, pleasure boat, or vessel * * * a sum equivalent to a tonnage tax."

In Section 36 it was stated:

> "That a tonnage duty * * * is hereby imposed."

By Section 210 of the Revenue Act of 1918 it was declared:

> "That * * * there shall be levied, collected and paid for each taxable year upon the net income of every individual a normal tax." (40 Stat. 1062.)

Many other revenue laws could be cited to show that Congress has uniformly employed the proper technical

words appropriate for the levy of taxes when that was the purpose in view. For instance, such words as "levy," "assess," "impose," "duty," "tax" and the like have been used. The entire absence of any such words from this section of the Interstate Commerce Act can not fail to be significant.

It is also worthy of mention that the Transportation Act included many provisions which were not incorporated into the Interstate Commerce Act, as, for instance, those relating to the Labor Board, to settlements with carriers respecting the use of their property during Federal control, and those relating to the six months guaranty. The scope of the Interstate Commerce Act has always been confined to measures relating to the regulation of interstate carriers. If it had been the purpose of Congress to levy a tax for the purpose of creating the loan fund into which these so-called excess earnings are to be paid, it would have been more consistent, not only with the scope and purpose of the Interstate Commerce Act, but also with the methods employed in drafting the Transportation Act, if Congress had provided, in the Transportation Act alone, for a method of raising the revenue, and had put into the Interstate Commerce Act, by amendment, only so much of that matter as related to the investment or use of the fund by the Commission. The fact that the provisions for these payments by carriers were carried into the Interstate Commerce Act denotes that the object and purpose of Congress was not to raise revenue or to levy a tax but to accomplish some other end, under pretense of regulation.

The title of the Transportation Act, in which these

provisions are found, carries no suggestion that it contained any taxing measures.

While the title of an act of Congress is not conclusive as to the legislative purpose or design, it may at least be resorted to as an indication. *Millard v. Roberts,* 202 U. S. 429, 50 L. Ed. 429.

The controlling factor, however, in determining the intention of Congress is the language actually employed in the law to be construed. The language of paragraph (5) of Section 15a removes any doubt that may have existed on the subject. The statement there is that:

> "Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, *without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return* upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States." (Italics ours.)

The recitals contained in paragraph (5) are in the nature of a preamble which this court has well denominated as "a key to open the understanding of a statute." *Coosaw Mining Company v. South Carolina,* 144 U. S. 550, 36 L. Ed., 537.

These recitals in the act make it obvious that the

purpose of Congress was not to raise revenue but that it was to limit the earnings of those carriers so favorably situated as to be able to earn a comparatively high rate of return from any level of rates which would support their average competitors. This court plainly recognized that purpose on the part of Congress when it said, in the New England Divisions Case, (*Akron Canton & Youngstown R'y Co. v. United States*, 43 Sup. Ct. Rep. .....):

> "Moreover, it was not clear that the people would tolerate greatly increased rates, (although no higher than necessary to produce the required revenues of weak lines) *if thereby prosperous competitors earned an unreasonably large return* upon the value of their properties. The existence of the varying needs of the several lines and of their *widely varying earning power* was fully realized." (Italics ours.)

The fact that these moneys were to be paid to and administered by the Commission rather than the Treasury Department also negatives the thought that any tax was levied or assessed. The Treasury Department has always been the official tax collector of the government and no construction of an Act of Congress changing this established order should be lightly adopted. The income taxes payable by carriers are determined as to amount by the books of account kept by the carriers under the supervision of the Commission. The same books of account would determine the so-called excess earnings of the carriers. If it be said that the superior equipment of the Commission for investigating the accounts of carriers caused Congress to impose upon the Commission the duty of collecting these excess earnings,

why was the same duty not imposed upon it with respect to income taxes payable by carriers?

If the act is a taxing law it is necessarily an appropriation act as well, by virtue of which the proceeds of the tax are made available for the loan fund mentioned in Section 15a, just as in Section 210 of the Transportation Act (41 Stat. 468) the sum of $300,000,000.00 was appropriated to carry out the purposes of Sections 206 and 210 of that act. If the act be looked on as an appropriation measure it violates another firmly established precedent of the government by appropriating funds to be received, not only beyond the end of one fiscal year, but those to be taken in for all time in the future.

Furthermore, considering the fact that Congress, as evidenced by the appropriation just referred to, had in mind the necessity for making appropriations of government funds to carry out the purposes of the Transportation Act, is it not extremely significant that the word "appropriation" is nowhere used with respect to the devotion by the Commission of the moneys supposed to be received by it under Section 15a to the purposes of the fund provided for in that section?

Furthermore, the appropriation made by Section 210 of the Transportation Act was treated as other public moneys and the effect of the law was to permit that sum of money to remain in the Federal Treasury, until loaned or expended, as provided in the act. The Commission, it is true, had some administrative duties with respect to loans to be made from that fund, but it was not given the control of the fund and the fund was left with the Treasury Department as all other public moneys resulting from taxation.

These conclusions, therefore, are inescapable:

That by this law Congress did not intend to levy or assess a tax of any character; that it did not in fact levy or assess a tax; that it did intend to limit the earnings of carriers by railroad available for distribution to stockholders; that it sought to impose this limitation by taking a part of the earnings of prosperous carriers; and that the creation of the loan fund was a mere incident of the desire to limit earnings and was a mere make-weight employed to give color to an unconstitutional taking of private property by providing what was thought to be an appropriate use for the moneys taken; the recital of the purpose was merely intended to sugar-coat the unconstitutional taking of property of the citizen.

In the opinion of the court below the New England Division case (A. C. & Y. R'y Co. v. United States, 43 Sup. Ct. Rep. 270), is relied upon as authority for the holding that the so-called recapture provision is an excise tax and quotation is made from the statement in that opinion as follows:

> "In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

But this court in that expression had no reference whatever to a tax in the sense of a governmental levy to be paid by the citizen. This is made plain from all parts of the opinion, and particularly by what immediately follows, in which it is said:

> "No part of the revenues needed by the New England lines is paid by the western carriers. *All is paid by the community pursuant to the single rate*

increase ordered in ex parte 74. If, by a single order, the Commission had raised joint rates throughout the eastern group forty per cent. and in the same order had declared that ninety per cent. of the whole increase and joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers in so ordering. The order entered in *ex parte* 74 was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders, instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in *ex parte* 74." (Italics ours.)

While the opinion itself clearly does not justify the construction that the so-called excess earnings recapture provision is not considered as a tax, one additional consideration so completely differentiates what is said in the opinion quoted from the construction given it by the court below, that we direct the court's attention to it.

This difference is that *ex parte* 74 was the act of the Interstate Commerce Commission, and not of Congress. *Ex Parte* 74 was an act of the Commission to increase railroad rates, not to levy or assess a tax, in response to a congressional mandate, and this court, in the opinion quoted, declared that "the order here in question may properly be deemed a supplement to, or modification of, that entered in *ex parte* 74." So that, if the opinion in the New England case is to be held as an authority for declaring the so-called recapture of excess earnings to be *an excise tax, as* held by the court below,

we have placed this court in the anomalous position of having held that the Interstate Commerce Commission might lawfully *levy an excise tax* upon the citizen. It is evident that the court below, in extracting from the opinion the single sentence quoted in its opinion, entirely overlooked the relation of the part to the whole, and took literally words of this court which were used only figuratively and for illustration.

VI.

The orders of the Interstate Commerce Commission dated January 16th and March 16th, 1922, expressly direct and require according to their terms, that within a fixed time one-half of all excess earnings, shown by the reports called for in such orders, shall be paid to the Commission, and inferentially direct and require that the other one-half of the excess earnings so shown be placed in the rserve fund contemplated by Section 15a of the Interstate Commerce Act.

Under the terms of Section 15a one-half of the excess earnings of carriers is "recoverable by" the Interstate Commerce Commission. This obviously means that the Commission is entitled to make demand for the payment of such sums, if any, as may become due under the law. The orders provide that "the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission." This expression follows the words "It is ordered." (R. 19-22.)

Argument is unnecessary we think to make it plain that this requirement of payment to the Commission is an essential part of the order. Counsel for the Commission construes this language as a statement by the

Commission to the effect that the carrier is admonished and reminded that under the law the money should be paid to the Commission. Counsel for the Commission evidently did not confer with the Director of the Commission's Bureau of Finance before taking this position. Under date of September 23, 1922, the Director of that Bureau wrote to the Treasurer of Complainant (R. 34) stating that "*under the terms of the orders* one-half of this amount should be placed in a reserve fund and the remaining one-half remitted to Mr. Geo. B. McGinty, Secretary." A month later, under date of October 20, 1922, a second letter was written in which the statement was made that "*under the terms of the orders* one-half of this amount should be placed in a reserve fund and the remaining one-half should be paid by remittance to or draft in favor of the Interstate Commerce Commission."

This construction of the orders by the Director of the Commission's Bureau of Finance is, of course, not binding upon this court, but it plainly evidences the fact that appellant's construction of these orders is entirely in accord with the Commission.

Without attempting to indulge in any lengthy exposition of the meaning of the language used, we submit that the fair tenor and effect of the orders, when they are read in their entirety, is contained in the expressions quoted above from the demands for the payment of the money made by the Commission's Bureau of Finance. If the Commission had intended to give an admonition or a warning that would not have been difficult to do. The orders of an administrative body, such as the Commission, are not to be construed as strictly or by the same technical rules as a decree of court.

VII.

Appellant is entitled to be protected by an injunction against the penalties and prosecutions which will be inflicted upon it and its officers if it continues its refusal to observe the directions of Section 15a and of said orders of the Commission respecting the payment of money to the Commission and into a reserve fund.

The relief by way of injunction to protect citizens against the enforcement of an unconstitutional law or administrative order is so common and has been so frequently granted that it is not necessary to cite the cases in which writs have been issued for this purpose. In the bill of complaint, admitted by the motion to dismiss, it was alleged:

> "That complainant is informed and believes and charges that under the Act to Regulate Commerce, and amendments thereof and supplements thereto, and under the so-called Elkins Act and amendments thereof, defendants contend that complainant, and each of its officers and directors, is subject to a fine in a sum not exceeding five thousand dollars ($5,000.00), for failure to comply with the demands of the Commission to pay to it and to pay into said reserve fund the said several sums of money hereinbefore set out. Complainant alleges that it is informed and believes and so avers, that the defendants contend that each of its officers and directors is subject to be prosecuted by the defendants herein, and particularly by the defendant Randolph Bryant, acting in his official capacity as United States District Attorney as aforesaid, unless said respective orders of the Commission are complied with and unless said respective sums of money, aggregating the sum of fifty-five thousand, four hundred and thirty-three and 22-100 dollars

($55,433.22) are paid to the Commission and into the so-called reserve fund, as required by said Section 15a, and demanded by said Commission; that the construction of said laws by the defendants is a constant and continuing menace to complainant, for the reason that its officers and directors, other than its president, have small interests in the properties of the complainant and cannot afford to take the risk of being prosecuted for violation of the laws of the country and being subjected to fines and humiliation on account thereof, nor can complainant afford to ask them to take such risk in order to continue in its service, and upon information and belief complainant avers that it is in constant, continuing and imminent danger of losing the service of its officers and directors, as they would probably resign if any such prosecution should be instituted or for their own protection they might compel complainant to pay said sums of money, which in the judgment of complainant it does not owe and should not be compelled to pay. If such officers and directors should resign, complainant could not procure others to take their places without giving them full and complete indemnity against financial liability, and as it cannot give indemnity to the present officers and directors, nor to any future officer or director, against the humiliation of being prosecuted for crime and against the annoyance and inconvenience of being haled into court to answer charges for violation of the laws of the country, complainant is confronted with the constant menace of the resignation of its officers and directors, the inability to obtain others, and the consequent inability to perform its functions and discharge its duties as a common carrier, for failure to do which it would be subject to very severe and extreme penalties under the laws of the State of Texas and under the laws of the United States.

"That prosecutions against said officers and against complainant would practically destroy complainant's ability to conduct its business and dis-

charge its duties. If complainant should pay said sums of money so demanded by the Commission to the commission, and set aside said special fund as required in the orders of the Commission, in order to avoid prosecutions and to enable it to continue to conduct its business, no provision is made in the Interstate Commerce Act or in the amendments thereof or supplements thereto, or in any other law of the United States, through, under, or by which such money could ever be recovered, though wrongfully paid, as the United States has never consented by law to be sued in any court for the recovery of any such sum so paid; and if complainant be wrongfully advised in this respect, and if there be a method by which the courts could determine the liability in this respect and compel restoration to complainant of any money paid by it to the Commission upon unlawful demand therefor, yet nevertheless the expense incident to a suit for that purpose would be very large, as such suit would have to be conducted in the District of Columbia, which is some twelve hundred miles from the situs of complainant's property and its conduct of its business, and even if it should recover the sums of money so paid by it, it could not recover such expenses and could not recover the interest on said money which would remain in the hands of the Commission or in the hands of the government for many years, pending a determination of the issues here involved.

"Complainant further alleges that if the validity of said orders and demands of the Commission and of said provisions of Section 15a of the Interstate Commerce Act be not challenged and tested in a proceeding of this character, the Commission will sue complainant to require the enforcement of said orders and demands and for the recovery of said sums of money and for fines and penalties; that in any such suit there will necessarily be involved the issue of the value of complainant's property devoted to the service of transportation and to common car-

rier purposes; that the proper solution of that issue will depend upon many facts, will involve many complexities, and the cost of making preparation for and the trial upon that issue, necessitating the employment of clerks, auditors, engineers, and other laborers and specialists, will be extremely burdensome; all of which may be avoided by the present form of action.

"Complainant avers upon information and belief, that unless said several sums of money so demanded by said Commission are promptly paid, and said orders otherwise complied with, said Commission will undertake to prosecute Complainant, its officers and directors, for fines and penalties for failure to so pay, and that the defendant, Randolph Bryant, United States District Attorney, will be called upon by said Commission to institute prosecutions on account of the disobedience of said orders, and that he will in his capacity, as such United States District Attorney for the Eastern District of Texas, proceed to institute and vigorously push such prosecutions for the recovery of such fines and penalties.

"All of the matters and things above alleged and charged would cause to complainant irreparable injury, which could not be recovered in damages, nor could it otherwise be made whole, and consequently complainant is wholly without remedy at law for any relief against the wrongs, ills, trespasses and injuries herein complained of, and, unless restrained by your honor's most gracious writ of injunction, will be wholly remediless against the same.

"Complainant further avers that no damage or injury can or will result to the defendants if said prosecutions are enjoined and prohibited and the payment of said money is restrained, and complainant here now offers to enter into bond, with good and solvent sureties, in amount and form sufficient and satisfactory to the court, to guarantee the payment of all sums of money and the performance of every obligation on the part of complainant which

it may finally be adjudged to pay or to perform, and for all damages for such failure, and all interest on any sums of money which it may lawfully and ultimately be adjudged to pay.

"For as much as your complainant is wholly without any adequate remedy at law it avers that it will be wholly remediless unless protected by this Court's restraining order and writ of injunction." (R. 15-17.)

These averments of the bill were not specifically denied by the Commission's answer. On the contrary it rather emphasizes them, because the answer asserts that the orders of January and March, 1922, were by the Commission duly made and duly served upon the appellant in accordance with the authority conferred upon the Commission by law and that the law conferring such authority is constitutional and valid. (R. 39.) This is an affirmation of the proposition that the Commission regards its orders as lawful and enforceable and it may be assumed that until that view is changed it will endeavor to perform its duty by doing all things necessary and appropriate for their enforcement.

Paragraph (1) of Section 10 of the Interstate Commerce Act reads as follows:

"(1). That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited, or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any

act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense; PROVIDED, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The opening sentence of the Elkins Act, as amended June 29, 1906 (32 Statutes at Large, 847, 34 Statutes at Large, 584), is as follows:

"That anything done or omitted to be done by a corporation common carrier subject to the Act to Regulate Commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdeameanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed."

By paragraph (1) of Section 12 of the Interstate Commerce Act "the Commission is hereby authorized and required to execute and enforce the provisions of this act."

Paragraph 6 of Section 15a of the Interstate Commerce Act definitely requires that one-half of all excess earnings shall be placed in the reserve fund there mentioned until said fund equals five per cent, of the carrier's property, and that the other one-half shall be paid to the Commission. It would, therefore, appear that if the act is valid and if the orders actually require the payment and the complainant fails to pay, then, in the language of Section 10, complainant will "willfully omit or fail to do an act, matter or thing in this act required to be done" and thereby under Section 10 and the amendment to the Elkins Act, the corporation, its officers and directors, would be subject to prosecution and to a fine of not to exceed $5,000.00 for each offense.

The only reasonable assumption therefore which may be indulged in the premises is that, regarding its orders as valid, the Commission will, unless restrained, proceed to have penalty suits instituted against appellant and prosecutions against its officers for their failure to observe and comply with the orders here under attack. If the law is invalid, the orders are invalid and their enforcement should be enjoined as against the Commission and the District Attorney as well as against the Government. If the law in valid, then in any event the appellant should be allowed a reasonable time after the final termination of the litigation within which to comply with the law, and with the orders of the

Commission made in pursuance thereof, before any penalties are inflicted upon it.

VIII.

This record shows conclusively that the true value of appellant's property, held for and used in the service of transportation during the respective periods involved substantially exceeded the amount upon the basis of which appellant's so-called excess earnings, as disclosed in the record, have been comput-· Therefore, a failure to accord relief herein would ılt in taking, as so-called excess earnings, portions of ₋ppellant's private property not justified or required by the terms of the act in question, without due process of law, in violation of the Fifth Amendment, even if the act be held valid for all purposes.

Appellant's so-called excess earnings, as shown by the returns which it made to the Commission (R. 24, 28), were computed upon the understanding that the rules of the Interstate Commerce Commission, assumed appellant's *investment* in road and equipment represented the *value of* its property upon which, under the act, it is entitled to earn and keep six per cent, and that the report of the so-called excess earnings was required to be made upon this assumed basis.

In the bill of complaint, the averments of which were admitted by the motion to dismiss, appellant stated:

> "That said reports truly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, but neither of said values represents the true value of complainant's property, which is devoted to and used

for common carrier purposes, and complainant especially denies that either such value is the true value of its said property, and avers that in making its reports it used such values solely because it understood the rules of the Commission to compel complainant to use and set up such values from its books and records, and complainant duly reported to the Commission all the facts called for in each of said respective orders, in accordance with the rules prescribed in said orders, and in accordance with the books, records and accounts of complainant for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules promulgated by said Commission. But said reports do not, and will not in the future, truly reflect the actual receipts, expenses and income properly and equitably attributable to said respective periods of time, as is more fully set forth below." (R. 5-6.)

In sub-division (b) of paragraph thirteen of the bill of complaint (R. 11) it was further alleged:

"Said reports do not reflect the true facts as to the property values devoted to carrier purposes."

The answer of the Commission (R. 36-38) disclaimed any information as to the truth or falsity of these allegations and, as between the Commission and the appellant, put the same in issue.

At the hearing appellant supported the foregoing allegations by the following proof:

(a) A valuation of its property by the Railroad Commission of Texas, acting within the scope of its lawful authority, showing that the property as of June 30, 1922, had a value of $929,020.82 (R. 42-43).

(b) The affidavit of its vice-president and general manager, Mr. A. E. Kerr (R. 44-45), in which it was

stated that, in his opinion, the value of appellant's property held for and used in the service of transportation on the 30th day of June, 1922, was *not less* than the sum so found by the Railroad Commission of Texas; that the additions and betterments to the property between January 1, 1922, and June 30, 1922, less retirements, amounted to $21,798.93; that the additions and betterments, less retirements, during the calendar year 1921 amounted to $59,254.73, and during 1920 they amounted to $102,596.72; that in his opinion the value of said property as of December 31, 1921, was not less than $907,221.89; as of December 31, 1920, $847,967.16, and as of December 31, 1919, $745,370.44; and the fair average value of said property during the calendar year 1920 was not less than $796,668.80, and during the year 1921 was not less than $877,594.52. He further stated that the betterments for 1920 and 1921 were distributed throughout the year and the last two figures were obtained by adding one-half of the betterments made during the year to the total value as of the first of the year.

(c) Appellant also introduced the affidavit of its vice-president and treasurer, J. J. Balderach (R. 49-57), who executed the returns to the Commission on behalf of appellant (R. 25, 30). Mr. Balderach stated in this affidavit:

> "As alleged in paragraph nine of said petition the reports of Dayton-Goose Creek Railway Company, copies of which are attached to said petition as Exhibit "C" and Exhibit "D," directly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book value, according to the rules and requirements of the Interstate Commerce Commission, and that by said

reports said company duly reported to the Commission all the facts called for in each of said respective orders in accordance with the rules prescribed in said orders and in accordance with the books, records and accounts of said company for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules of the Interstate Commerce Commission.

"That in my opinion the value of the property of said company devoted to the service of transportation, as shown upon said reports, respectively, does not represent the true value of such property as of the periods covered by said respective reports, which true value, in the opinion of affiant, is substantially in excess of any value shown in either of said reports. That both of said reports were compiled, checked and verified by affiant and that in making said reports affiant used the values shown therein because he understood the rules of the Commission contained in the orders referred to in said petition to compel said company to use and set up the value of said property from its books and accounts."

The investment in road and equipment, as shown in the returns made by appellant to the Commission, was on February 28, 1920, $543,471.97; on December 31, 1920, $613,994.82, and on December 31, 1921, $699,502.96 (R. 24, 26, 31), making an average for the 1920 period of $578,733.40 and for the year 1921 $656,748.89. The average investment in road and equipment, therefore, as shown by the returns made to the Commission, is less by more than $200,000.00 in each of the periods involved than the value fixed by the Railroad Commission of Texas and carried backward by Mr. Kerr's affidavit. In other words, the proof showed that the *true value* of appellant's property was so much greater than the cost

figures, used by mistake in the returns to represent those values, that if the figures given by Mr. Kerr had been used instead, the so-called excess earnings would have been, for each of the periods involved, less by at least $12,000.00 than the amounts shown on the returns.

The bill therefore, as admitted by the motion to dismiss, and as proven on the hearing, makes out a plain case of mistake, involving in the aggregate about $25,000.00, and even if the act and the orders of the Commission here under attack should be held to be valid, as against the constitutional objections urged against them, it is nevertheless plain that the court below erred in dismissing the bill and thereby denying relief against this mistake.

It is a matter of common knowledge that the Interstate Commerce Commission has undertaken to value the properties of the railroads of the country upon the prices prevailing as of June 30, 1914. The group valuations made in *ex parte* 74 may have had some influence in the preparation of the Commission's order requiring the reports to be made and stating what should be shown in those reports, to determine values of carriers having so-called excess earnings. But it is manifest from the record in this case, that no basis, consistent with the opinions of this court, was ever fixed by the Commission upon which to determine the value of appellant's property. It is necessary in this connection to note only one case.

In *State of Missouri ex rel Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 43 Sup. Ct. Rep. 544, the opinion of this court so obviously disposes of the case at issue that we are con-

tent with the pertinent quotation from that opinion, in which it was said:

"Obviously the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum.

"In Wilcox v. Consolidated Gas Co., 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 195, 200 (53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034), this court said:

" 'There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we concur with the court below that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase.'

"In the Minnesota Rate Cases, 230 U. S. 352, 454, 33 Sup. Ct. 729, 762 (57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann Cas. 1916A, 18), this was said:

" 'The making of a just return for the use of the property involves the recognition of its fair value, if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.'

"Eee, also, Denver v. Denver Union Water Co., 246 U. S. 178, 191, 38 Sup. Ct. 278, 62 L. Ed. 649, Newton Consolidated Gas Co. of New York, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. Ed. 538 (March 6, 1922), and Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678 (April 10, 1922).

"It is impossible to ascertain what will amount to

a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

(A) It is alleged in paragraph nine of the bill of complaint that the so-called value upon which the Commission computed its claim for excess earnings was not the true value of complainant's property, and this allegation being taken as true upon defendant's motion to dismiss the bill, it necessarily follows that the lower court erred in sustaining the motion.

It is a well settled rule of practice that "a motion to dismiss, like a demurrer, admits the truth of the allegations of fact in the bill." (*Foster, Federal Practice*, 6th Ed., Section 366.) The rule is thus stated in *Detroit United R'y v. City of Detroit*, 248 U. S. 429, 541:

> "The question upon this appeal is: Did the bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court (in dismissing the bill) was equivalent to sustaining a demurrer to the bill."

The same question is presented here. Did the bill of complaint, taking its allegations to be true, including the allegations in paragraph nine, state grounds for relief to which the company was entitled upon the facts set forth? The action of the lower court, in sustaining the motion to dismiss, must stand or fall upon the averments

of the bill, unaided by the allegations of the answer. (*U. S. v. R'y Employes' Dept.*, 286 Federal 288; *Krouse v. Brevard Tannin Co.*, 249 Federal 538; *Stromberg v. Holley*, 260 Federal 220.)

In paragraph nine it is averred that the reports made by the complainant to the Commission properly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, "but neither of said values represents the true value of complainant's property, which is devoted to and used for common carrier purposes, and complainant especially denies that either such value is the true value of its said property"; and complainant further averred that in making its reports to the Commission it used such values solely because it understood the rules of the Commission to compel it to use and set up such values upon its books and records.

The case in this court, therefore, is one where it stands admitted that the value of complainant's railroad property, upon which the six per cent. return is based, and on which the Commission has computed the alleged excess earnings demanded in its order, is not the true value of the property. How, then, can the Commission's order or assessment be permitted to stand?

Under the provisions of paragraph 6 of Section 15a of the Interstate Commerce Act, one-half of the net railway operating income "in excess of six per centum of the value of the railway property held for and used by it in the service of transportation" shall be paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund. It is appar-

ent, therefore, that net railway operating income up to six per cent. of the value of the railway property is exempt or immune from the recapture provision. This six per cent. must first be determined and set aside before it can be ascertained whether there are any excess earnings subject to recapture, and if so, the amount thereof. But it is six per cent. upon *the value* of the property. The value of the property, therefore, is the starting point. Until the value is determined, there can be no computation of the immune six per cent. Nor can it be said that there will, or will not, be excess earnings subject to recapture.

The bill alleges that the figure upon which the immune six per cent. was based "was not the value of the railway property," and this allegation, for the purpose of this appeal, is admitted to be true. The true value of complainant's railroad property must be something different from the figure used by the Commission. There has been, therefore, no computation of the immune six per cent. upon the true value of the property. Until the true value is made to appear it cannot be said how much, if any, the net railway operating income exceeded six per cent. of such value, and hence there is nothing to show that there are any earnings subject to recapture. The foundation on which the Commission's computation rests is proven to be false, and therefore the computation itself and the order of the Commission are made upon a wrong theory of law, without facts or evidence to support it, and the contested order is beyond the power and authority of the Commission, and therefore invalid.

It is true that the complainant reported to the Commission (R. 24-33) a statement of its investment in road and equipment, and the items making up its net railway

operating income, and that the Commission took the investment in road and equipment as the value of the complainant's property, and based its computation thereon. But the complainant expressly stated in its reports that they were not filed voluntarily, but by compulsion, and under protest and for the sole purpose of avoiding prosecution and possible penalties (R. 25, 28), and further protested against the accuracy of the preliminary bases prescribed in and by the order of the Commission, and all rights were expressly reserved to object to any conclusions which the Commission might reach upon the reports so filed, as well as to any report or order made thereon or in connection therewith. These reports, in legal effect, were made under duress, and hence they work no estoppel against the complainant (*Union Pacific R. Co. v. Public Service Commission*, 248 U. S. 67; *Pomeroy* on *Equity Jurisprudence* (6th Ed.), Section 948; *Swift v. U. S.*, 111 U. S. 22; *U. S. v. Holland-America Line*, 205 Federal 943.)

Furthermore, value is a judicial question (*Monongahela Case*, 148 U. S. 312; *U. S. v. New River Collieries Co.*, decided May 21, 1923). Thus far, no one knows with certainty how railroad property is to be valued in the application of the so-called recapture clause of the Transportation Act, or what rules or principles are to be applied. It still remains for this court to settle and determine these questions. Certainly, under these circumstances, the complainant cannot be estopped to show the true value of its property, as it now proposes to do in its bill, by reason of the compulsory reports made by it to the Commission, wherein it undertook merely to state facts, without any conclusions or speculations of its own as to the value of its property.

It clearly appearing, therefore, on the face of complainant's bill, that the value of complainant's railway property, upon which the Commission had made its computation, was not its true value, a clear ground for relief is stated, and the lower court erred in sustaining the motion to dismiss.

(B) The Commission erred in arbitrarily adopting cost of road and equipment as the true value of the complainant's property, and therefore its order based thereon is unlawful, and its enforcement should be enjoined.

It appears from Exhibit "D," attached to complainant's bill of complaint (R. 30), that six per cent. on investment in road and equipment for 1921 amounts to $39,181. This sum is apparently adopted by the Commission as six per cent. upon the value of the complainant's railroad property. Such value would be represented, therefore, by capitalizing the sum of $39,181 at six per cent., which gives the sum of $653,033 as the amount of investment in road and equipment for that year, and this figure is *assumed* by the Commission to represent the value of the complainant's railroad property for the purpose of proceeding under the so-called recapture clause. In other words, the Commission takes the cost of road and equipment as shown on the complainant's books and solemnly declares that this is the value of complainant's railroad property on which it is entitled to earn six per cent., and no more, without paying one-half of the surplus to the Commission.

While the rules and principles for the determination of the value of railroad property in the application of the recapture provision have not yet been definitely and

authoritatively determined, yet it is fairly well established that *cost* is not *value*. It was, therefore, error on the part of the Commission to take the cost of road and equipment, particularly cost of original construction, not shown to be cost as of the date of the inquiry, and to treat it as the value to which the recapture provision should be applied.

That value is not measured by cost is apparently established in this court (*State of Missouri v. Public Service Commission*, decided May 12, 1923; *Bluefield Water Works & Improvement Co. v. Public Service Commission*, decided June 11, 1923; *Georgia Railway & Power Co. v. Railroad Commission*, decided June 11, 1923). In the *Southwestern Bell Telephone* case the court quotes with approval the following from the *Minnesota Rate* cases, 230 U. S. 352, 454:

> "The making of a just return from the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

Doubtless original cost, and cost of production as of the date of the inquiry, are relevant pieces of evidence to be considered in the determination of value; but neither of these pieces of evidence, taken by itself, can arbitrarily be said to constitute or measure value. As said in the *Bluefield* case, *supra:*

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment

having its basis in a proper consideration of *all* relevant facts." *The Minnesota Rate Cases* (1913), 230 U. S. 352, 434.

In the *Georgia R'y & Power Co.* case, *supra,* it is recognized that reproduction cost is a proper piece of evidence to be considered, but that it is not the measure of value. The court said:

> "The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct."

The determination of value is a judicial function, and according to *Smyth v. Ames,* 169 U. S. 546, 647, various items of evidence, such as original cost of construction, the amount expended in permanent improvements, the amount and market value of stocks and bonds, the present as compared with original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all competent, relevant and material. None of these elements may be ignored. The final judgment determining the value must rest upon a consideration of all of them, giving each its proper weight.

But the Commission went through no such processes. It took the complainant's statement showing investment in road and equipment, as of some previous date, and arbitrarily said, "This is the value of complainant's property," and proceeded to apply the recapture provision to it. For this there is no warrant or authority in law.

Nor was there any evidence that the cost of road and equipment shown in the complainant's statement properly reflected such costs as of the date of the inquiry. The presumption would be otherwise, since the valuation made by the Railroad Commission of Texas as of June 30, 1922 (R. 42), indicates a total value of $929,020.82.

The condition of the record, set forth in the immediately preceding pages of this brief, drives inevitably to the conclusion that whatever the ultimate holding may be, as to the constitutionality of the so-called recapture provisions of the Transportation Act, this case must be reversed, for that the value of the property of appellant devoted to a public use has never been ascertained in any lawful manner, and, as is conclusively shown in this record, greatly exceeds the amount upon which the Commission bases its right to collect the so-called excess earnings. If the so-called recapture provisions of the Transportation Act should be held valid it is nevertheless indispensable that this case be reversed by this court and returned to the lower court, for the purpose of determining the value of appellant's property devoted to a public use, and a consequent assessment of the so-called excess earnings, if any, when that value has been ascertained.

For the reasons set forth and upon the propositions contained in this brief, and upon the authorities, facts and argument, appellant prays that the judgment of the court below be set aside, that the so-called recapture clause of the Transportation Act be declared null and void, that judgment be here rendered for appellant, granting the relief it prayed for in the court below; and that, if the relief above prayed for be not granted,

the cause be reversed under proper instructions to the lower court, to ascertain and determine the value of appellant's property before any assessment or collection can be made for or on account of the so-called excess income provisions of the Transportation Act.

All of which is respectfully submitted,

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